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Comments

COMMENTS

COMMERCIAL TRANSACTIONS — UNIFORM COMMERCIAL CODE — SIGNATURE BY AUTHORIZED REPRESENTATIVE— FAILURE TO INDICATE REPRESENTATIVE CAPACITY*

It is difficult to determine from the face of a negotiable instrument bearing two or more signatures whether one party signatory intends to bind the other signatories, himself as comaker, or himself alone. The question is reduced to the relation and form of the signatures, and the objective intent of the agent as disclosed by the bare instrument controls.[1] When a negotiable instrument is signed by an individual directly beneath the name of a corporation, without indicating by words of agency that he is signing merely in a representative capacity, he is prima facie personally liable, unless it can be established as between the immediate parties that he intended not to be individually bound. Adopting this position section 3-403(2)(b) of the Uniform Commercial Code provides:

> An authorized representative who signs his own name to an instrument . . . except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not have that the representative signed in a representative capacity . . . .[2]

Under section 3-403(2)(b) if an authorized agent discloses the name of his principal, but fails to disclose his representative capacity, he may escape personal liability in litigation between the parties to the original transaction by showing by parol evidence that he signed in a representative capacity. After the instrument has passed from the payee into the hands of a third party holder in due course the apparent statutory language prohibits the use of parol evidence to show representative capacity. In *Pollin v. Mindy Manufacturing Co.*,[3] however, the Superior

* Pollin v. Mindy Mfg. Co., 236 A.2d 542 (Pa. Super. Ct. 1967).

1. W. Britton, Bills and Notes § 174 (2d ed. 1961).

2. Uniform Commercial Code § 3-403(2)(b).

3. 236 A.2d 542 (Pa. Super. Ct. 1967). Judgment below had been rendered against the corporation, but on appeal this was mentioned only in passing in an attempt to further solidify the Court's reasoning in holding the agent-appellant not personally liable on the check.

Court of Pennsylvania denied recovery by a third party endorsee against one who affixed his signature to a payroll check directly beneath the corporate name without indicating his representative capacity.

In *Pollin* the checks were boldly imprinted at the top with the corporate name, address, and appropriate payroll check number. The typed name of the drawee bank appeared in the lower left hand corner of the instrument, and the corporate name was imprinted in the lower right hand corner. Directly beneath the corporate name were two blank lines. The defendant-appellant had signed the top line without any designation of office or capacity. Pointing out that the Code imposes liability on the individual only when the instrument controverts any showing of representative capacity, the court considered the instrument in its entirety. The court held that disclosure on the face of the instrument that the checks were payable from a special payroll account of the corporation over which appellant had no control as an individual negated any contention that appellant intended to make the instrument his own order to pay money to the payee.

The interpretation placed upon section 3-403(2)(b) by the Pennsylvania court appears to differ from the sound policy intended by the Code framers—that the transferability of negotiable instruments should not be impeded. To understand this overriding policy consideration a review of case decisions rendered prior to the adoption of the Uniform Commercial Code must be undertaken.

The law merchant, absorbed as a body of rules and principles by the common law,[4] exerted force in the determination of the rights and obligations of parties to commercial instruments. Commercial instruments existed only as a result of mercantile enterprise, and became negotiable by the custom of merchants.[5] As the body of commercial case law increased, the authorities became increasingly aware of the hopeless confusion concerning the signature of an authorized representative.[6]

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4. Aigler, *Recognition of New Types of Negotiable Instruments,* 24 COLUM. L. REV. 563, 564 (1924).

5. *See* Peay v. Pickett, 1 Nott & McC. 254, 255 (S.C. 1818).

6. 1 J. JOYCE & H. JOYCE, DEFENSES TO COMMERCIAL PAPER § 31 (2d ed. 1924); *See* Commercial Nat'l Bank v. Reichelt, 62 Mont. 303, 204 P. 1037, 1038 (1922). *See generally* F. BEUTEL, BEUTEL'S BRANNAN NEGOTIABLE INSTRUMENTS LAW 48 (7th ed. 1948).

The Negotiable Instruments Law (N.I.L.),[7] promulgated in 1896, was intended to create uniformity in the rights and liabilities of parties to negotiable instruments throughout the nation.[8] Prior to the N.I.L. if a person indicated representative capacity by adding the words "Agent, President, Secretary, etc.," the majority opinion was that the additional words were merely *descriptio personae*,[9] and that parol evidence was not admissible to establish representative capacity. Under the N.I.L. formulation, however, if one signed an instrument and affixed words indicating representative capacity, the disclosed principal, rather than the agent, would be individually bound.

Under section 20 of the N.I.L.[10] two signatory procedures would have effectively disclosed the agent's intention to bind the principal: (1) A recital on the face of the instrument that the agent signed for or on behalf of the principal, or in a representative capacity; or (2) the addition to his signature of words indicating the same.[11] When there was disclosure of the principal and two agents signatory, however, and only one of the agents indicated representative capacity, there was a division of authority with respect to whether the second agent was personally liable or could show by parol evidence that he intended not to be bound.

In *Coal River Collieries v. Eureka Coal & Wood Co.*,[12] the defendant, president of Eureka Coal, affixed his name with-

7. F. BEUTEL, BEUTEL'S BRANNAN NEGOTIABLE INSTRUMENTS LAW 79 (7th ed. 1948).

8. Coal River Collieries v. Eureka Coal & Wood Co., 144 Va. 263, 279, 132 S.E. 337, 342 (1926); *cf.* Austin, Nichols & Co. v. Gross, 98 Conn. 782, 120 A. 596, 597 (1923).

9. 1 J. JOYCE & H. JOYCE, DEFENSES TO COMMERCIAL PAPER § 31 (2d ed. 1924); Metcalf v. Williams, 104 U.S. 93 (1881); Barclay v. Pursley, 110 Pa. 13, 20 A. 411 (1885); Wallace v. Langston, 52 S.C. 133, 29 S.E. 552 (1898). *But see* Mechanics' Bank v. Bank of Columbia, 18 U.S. (5 Wheat.) 100 (1820). In this case a cashier drew a check and signed it without any official designation. The bank's name appeared on the face of the instrument. The Court resorted to parol evidence stating that if marks of an official character not only exist on the face of the instrument, but predominate, parol evidence is necessary to fix its true character.

10. *See* F. BEUTEL, BEUTEL'S BRANNAN NEGOTIABLE INSTRUMENTS LAW 411 (7th ed. 1948). Section 20 of the N.I.L. provides:

> Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability.

11. W. BRITTON, BILLS AND NOTES § 163 (2d ed. 1961).

12. 144 Va. 263, 132 S.E. 337 (1926).

out designating his official capacity. The corporate name and the signature of the company's treasurer, denoting a representative capacity, appeared directly above the defendant's signature. Defendant attempted to use parol evidence to show that the payee had notice of his official character, and had understood that the defendant was not to be bound individually. Ruling that parol evidence was inadmissible and that the unqualified signature of the defendant rendered him personally liable, the court stated that the "unexpressed intention could not be permitted to vary the legal effect of the express contract evidenced by an individual signature."[13]

Similar decisions interpreted the language of section 20 to indicate clearly a purpose to exclude parol evidence. These courts reasoned that the N.I.L. itself fixed the legal effect of the instrument and an indorsement appearing thereon.[14] Therefore, the intent of the parties, as legally evidenced on the face of the instrument, determined who was bound by the terms of the contract.[15]

A substantial number of courts developed a different line of reasoning than that evidenced by the decision in *Coal River Collieries*. In these cases indications of apparent ambiguities on the face of an instrument occasioned by the signature of two agents beneath the corporate nane, one indicating representative capacity and the other being silent, permitted the admission of parol evidence to controvert personal liability. In *Wright v. Drury Petroleum Corp.*[16] two agents signed a note, disclosing their corporate principal. One agent indicated official capacity by inclusion of the words "Executive Board" next to his signature. The second agent had no representative capacity evidenced on the face of the note. The court admitted parol evidence to establish representative capacity. The court gave a liberal interpretation to section 20 in order to permit the admission of parol evidence. It interpreted the statutory requirement of words in-

13. *Id.* at 282, 132 S.E. at 343.

14. Betz v. Bank of Miami Beach, 95 So. 2d 891 (Fla. 1957); Valentine v. Hayes, 102 Fla. 157, 135 So. 538 (1931); Wright v. Drury Petroleum Corp., 229 Mich. 542, 201 N.W. 484 (1924); Coal River Collieries v. Eureka Coal & Wood Co., 144 Va. 263, 132 S.E. 337 (1926).

15. Wallace v. Langston, 52 S.C. 133, 29 S.E. 552 (1898); *see* Coal River Collieries v. Eureka Coal & Wood Co., 144 Va. 263, 132 S.E. 337 (1926); Farmers' State Bank v. Lamon, 132 Wash. 369, 231 P. 952 (1925); W. BRITTON, BILLS AND NOTES § 174 (2d ed. 1961). *Contra,* Fricke v. Belz, 237 Mo. App. 861, 177 S.W.2d 702 (1944).

16. 229 Mich. 542, 201 N.W. 484 (1924).

dicating representative capacity to require no more than the use of appropriate words pointing to such capacity;[17] and that the relative position of such words and signature was immaterial.

A majority of the courts allowing parol evidence to show representative capacity, has limited its use to litigation between the original parties to the instrument. Consequently, when there was a patent ambiguity with respect to whether an agent signed in a representative or an individual capacity, parol evidence was admissible to show the facts and circumstances attending the execution of the instrument.[18]

In *New Georgia National Bank v. J. & G. Lippmann* [19] the New York court, speaking through Judge Cardozo, formulated a more liberal standard for permitting the admission of parol evidence. It provides:

> Whenever the form of the paper is such as fairly to indicate to the eye of common sense that the maker signs as agent or in a representative capacity, he is relieved of personal liability if duly authorized.[20]

Under the *Lippmann* formulation if one agent indicated official capacity and a second agent failed to do so, disclosure of the principal together with the relation and form of the agents' signatures would place an ordinary man on notice that the second agent also signed in a representative capacity. Therefore, if the agency was established, the agent could not be individually bound.

Another liberalization of the rules regarding the admissibility of parol evidence concerned its admissibility against a holder in due course. When parol evidence was sought to establish an understanding, recognized by the original parties to the transaction, that the agent was not to be personally liable it was held inadmissible as against the holder in due course. In contrast, when the instrument was so ambiguous as to put a reasonably prudent person on inquiry with respect to which party was

17. *Id.*, 201 N.W. at 485.

18. Myers v. Chesley, 190 Mo. App. 371, 177 S.W. 326 (1915); *see, e.g.*, Norman v. Beling, 33 N.J. 237, 163 A.2d 129 (1960); *cf.* Lazarov v. Klyce, 195 Tenn. 27, 255 S.W.2d 11 (1953).

19. 249 N.Y. 307, 164 N.E. 108 (1928).

20. *Id.* at 311, 164 N.E. at 109.

to be personally liable, parol evidence would be admissible as against an endorsee.[21]

In *Germania National Bank v. Mariner*[22] the note was similar in fashion to the note in *Drury Petroleum Corp.* The instrument contained words stating that the corporation would pay. The plaintiff bank purchased the note from the payee, unaware of the capacity in which the defendant had signed. The court stated that when a written contract is ambiguous in its terms, parol evidence may be introduced to show facts and circumstances surrounding execution to aid in construction.[23] The manner in which the defendant had signed the note, in conjunction with the statement on the face of the instrument that the corporation promised to pay, convinced the court to admit parol evidence to explain the note's ambiguity. Holding that the defendant placed his signature on the note not intending to be personally liable, the court stated:

> This rule [parol evidence] applies to commercial paper, even in the hands of third persons, because, where the ambiguity is apparent to a reasonably prudent man on the face of the paper, he is necessarily put upon inquiry.[24]

Commenting on the *Germania* decision, the court in *Coal River Collieries* ruled that only when an ambiguity was created on the face of the instrument, or when there was uncertainty as to the liability of the agent would parol evidence be properly admissible. Even then the use of parol evidence would be confined to litigation between the immediate parties.[25]

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21. Norman v. Beling, 33 N.J. 237, 163 A.2d 129 (1960); Germania Nat'l Bank v. Mariner, 129 Wis. 544, 109 N.W. 574 (1906); W. BRITTON, BILLS AND NOTES § 164 (2d ed. 1961). *Contra,* Continental Illinois Nat'l Bank & Trust Co. v. Hendrix Mill & Lumber Co., 186 S.C. 268, 195 S.E. 562 (1938). In this case the court stated that to defeat a bona fide purchaser for value, more than proof of facts and circumstances which give rise to suspicion or put a prudent person on inquiry is necessary. Actual notice or knowledge of this defect, indicating a purchase in bad faith, would be deemed sufficient.

22. 129 Wis. 544, 109 N.W. 574 (1906).

23. *Id.,* 109 N.W. at 576.

24. *Id.*

25. Coal River Collieries v. Eureka Coal & Wood Co., 144 Va. 263, 132 S.E. 337 (1926). For example, assume the instrument was signed:

X Corporation
A (signature), President
B (signature)

Under the *Germania* formulation parol evidence would be admissible because the note evidences an ambiguity with respect to the capacity in which B signed. But under the *Coal River Collieries* formulation A's signature denoting rep-

Much of the difference of judicial opinion can be further understood by examining the different promissory terms used in the instruments. If the note contained the words "we promise" the logical inference was that the agent, in the absence of words qualifying his representative capacity, intended to be bound as a co-maker. The transferability of negotiable instruments would be hindered if a third party to the transaction were charged with notice. This notice would require a duty of inquiry[26] into the subjective intent of the party signatories.

> It is of vastly more importance to the commerce of the country that the integrity and unassailability of negotiable paper, in the hands of bona fide holders for value, shall be maintained by the courts, than that persons who carelessly put their names to such paper shall be relieved of liability thereon.[27]

If the promissory terms were "I promise" or the "corporation promises," there would be justification for the belief that the agent signed merely as a matter of course and did not assume individual liability. The appearance of the corporate name on the face of the paper would justify the belief that the transaction was intended to create a corporate rather than an individual obligation.[28] This would explain the use of parol evidence as between immediate parties. As to a third party to the transaction, however, unless the note was taken in bad faith, the admission of parol evidence would again impair the negotiability of instruments.

While a corporation may adopt a typed or printed signature on a note, corporate by-laws frequently require the signature of corporate officers.[29] Because a corporation must act through

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resentative capacity taken in conjunction with B's signature that does not indicate representative capacity, clearly shows that B, on the face of the instrument, intended to be personally bound. Because there are no words to the contrary (negating personal liability) there cannot be shown by parol evidence an intention contrary to that which the face of the note unambiguously reveals.

26. 2 J. JOYCE & H. JOYCE, DEFENSES TO COMMERCIAL PAPER § 695 (2d ed. 1924).

27. Continental Illinois Nat'l Bank & Trust Co. v. Hendrix Mill & Lumber Co., 186 S.C. 268, 271, 195 S.E. 562, 563 (1938).

28. Mechanics' Bank v. Bank of Columbia, 18 U.S. (5 Wheat.) 100 (1820); Fricke v. Belz, 237 Mo. App. 861, 177 S.W.2d 702 (1944).

29. 1 W. DAVENPORT & R. HENSON, ILLINOIS PRACTICE 222 (1967). *See also* 2 J. JOYCE & H. JOYCE, DEFENSES TO COMMERCIAL PAPER § 704 (2d ed. 1924); *cf.* Coal River Collieries v. Eureka Coal & Wood Co., 144 Va. 263, 132 S.E. 337 (1926).

its agents, it is common to expect that the corporate name when stamped or typed on the negotiable instrument will be accompanied by the signatures of persons who would be authorized to sign the instrument. In *Norman v. Beling*[30] an action was brought by the holder of a series of notes against one of the individual signers. The notes contained the corporate maker's typed name. Beneath the typed name appeared the signatures of two individuals, neither of which designated representative or corporate capacity. The New Jersey court held that the notes, evidenced by the terms "we promise to pay," were ambiguous on their face, and permitted the admission of parol evidence to show representative capacity. The court stated that a reasonably prudent man would be unable to determine with any degree of certainty whether the defendant signed as co-maker or as an agent acting only for the corporation.[31]

In *Norman* the court indicated that the words "we promise" resulted in a decision no different than had the note indicated the "company promises to pay."[32] In *Reeve v. First National Bank*[33] the court stated that "the word 'we' is often used as a corporation aggregate,"[34] thereby creating the same effect as if the corporation itself made the promise. The court in *Norman*, commenting on the decision in *Germania*, stated that when the face of the instrument is ambiguous and suggests a defect, "the purchaser holder in due course is put on inquiry because to permit the purchaser to ignore such a warning with impunity has no sound basis."[35]

The decisions rendered in *Germania* and *Norman* added another dimension to the admissibility of parol evidence at the expense of a bona fide purchaser for value. Circumventing the established principle that prior equities and defenses when personal to the individual do not defeat the rights of a subsequent holder in due course, an unfavorable result was reached with respect to the transferability of negotiable instruments. The result was that the endorsee, a purchaser for value, was considered as having taken the instrument subject to the apparent ambiguity and therefore in bad faith.

30. 33 N.J. 237, 163 A.2d 129 (1960).
31. *Id.*, 163 A.2d at 132.
32. *Id.*, 163 A.2d at 133.
33. 54 N.J.L. 208, 23 A. 853 (1892).
34. *Id.* at 211, 23 A. at 854.
35. Norman v. Beling, 33 N.J. 237, 163 A.2d 129, 133 (1960).

The term negotiable instrument is merely a name given to particular documents that possess certain qualities or attributes. Freedom from the defenses and equities of prior parties when in the hands of an innocent purchaser for value is one of its principle features.[36] Whereas the N.I.L. was deficient in ascertaining liability of multiple signatories to a negotiable instrument,[37] section 3-403(2)(b) of the Uniform Commercial Code clarifies the N.I.L. and eliminates the confusion accompanying the awkward forms of signatures by representatives.

When the agent discloses his principal but fails to indicate his representative capacity, and the immediate parties are aware of the agent's capacity and intent, the Code permits the showing of representative capacity as between the immediate parties. In contrast *Coal River Collieries*[38] denied the use of parol evidence, on the ground that the instrument was a fully integrated contract. To permit a contrary showing by parol evidence would have altered or modified the terms of the contract. The Code, however, by adopting the rule of *Megowan v. Peterson*,[39] permits parol evidence to be introduced to prove representative capacity in litigation between the payee and the individual signer. Parol evidence does not vary the specific terms of the contract, but shows the nature and purpose of the transaction.[40]

In *Pollin v. Mindy Manufacturing Co.*[41] an initial inquiry with respect to whether the instrument indicated the capacity in which the appellant signed failed to reveal a representative capacity. Instead of giving effect to the aggregate words and intent of the section, the Pennsylvania court fragmented the section and gave emphasis to the words "if the instrument . . . does not show that the representative signed in a representative

36. Sutherland, *Article 3—Logic, Experience and Negotiable Paper,* 1952 WIS. L. REV. 230.

37. *See* W. HAWKLAND, COMMERCIAL PAPER 30 (1st ed. 1959).

38. 144 Va. 263, 132 S.E. 337 (1926).

39. 173 N.Y. 1, 65 N.E. 738 (1902). An action was brought to recover from defendant the amount of a promissory note containing the words "I promise to pay" and evidenced by the signature, "Charles G. Peterson, Trustee." Plaintiff contended that defendant's representative capacity must be disclosed upon the face of the instrument. The court held that insofar as innocent purchasers for value are concerned the representative capacity must be disclosed on the face of the note, but insofar as a payee was concerned there was no such requirement if it was the intent of the agent to bind only his principal.

40. W. HAWKLAND, COMMERCIAL PAPER 31 (1st ed. 1959).

41. 236 A.2d 542 (Pa. Super. Ct. 1967).

capacity." [42] The court, by considering only a part of section 3-403(2)(b), then construed the instrument in its entirety. By doing this the court successfully sidestepped the issue of parol evidence, frustrating the full import of the section. That section declares that when the agent fails to disclose his principal despite the use of words indicating a representative capacity, or when he discloses his principal but fails to designate a representative capacity, unless it can be shown that there was an understanding as between the immediate parties that the agent was not liable, the agent is personally liable. By limiting the section to the immediate parties, in all events a third party transferee would be protected even if an agreement did exist as between the immediate parties.

The court in *Pollin* reasoned that the agent signed in a representative because the instrument was a payroll check, payable out of a fund over which the appellant as an individual had no control. The court, however, erred in permitting the agent to prevail over an endorsee who had purchased the instrument in a good faith transaction with the payee.

The court appeared to reason subjectively that the endorsee took the instrument with notice because the character of the instrument sufficiently disclosed that the appellant could have signed only in a representative capacity. A more logical approach to the identical result would have been to construe the instrument in relation to the rights and obligations of the parties in the course of negotiating the check. The court could have examined only the position of the parties and the rights the endorsee took from his transferor, the payee. Section 3-302(1) defines a holder in due course and requires a taking for value, in good faith and without notice of any defense.[43] The court could have examined the endorsee's position as a bona fide purchaser for value without notice of any defense good as against himself or his immediate transferor. In *Pollin* if the endorsee took with notice that the instrument created an ambiguity as to the party to pay,[44] thereby barring any claim as a holder in due course, the court could have absolved the agent of liability because the endorsee took the instrument subject to all defenses which would

42. *Id.* at 545.
43. UNIFORM COMMERCIAL CODE § 3-302(1).
44. UNIFORM COMMERCIAL CODE § 3-304(1)(a).

have been available to the agent on a simple contract action.[45] As indicated by the reported facts, however, the endorsee was a a bona fide purchaser for value as against the agent, unless a payroll check was sufficient notice to prevent the endorsee from claiming as such. However tenuous the offered suggestion may be, it is clear that the court gave no consideration to this line of thought.

The court, however, should have based its decision on a proper interpretation of the applicable Code section. The signature by an authorized representative was the direct issue. By a proper application of section 3-403(2)(b) the court would have been limited to a finding of whether the agent signed in a representative capacity. If the action had involved the original parties to the transaction the court would have been within the statutory language by admitting parol evidence. When the action is between an agent and a third party endorsee, however, no consideration need be given to extrinsic evidence. The court should only consider whether the agent sufficiently indicated his representative capacity. In *Pollin* the check evidenced no such indication of representative capacity. Because the requirements of section 3-403(2)(b) were not satisfied, the court should have found the agent personally liable.

The court differed from, if it did not controvert, the intent of the Code framers by its interpretation of section 3-403(2)(b). As between the competing rights of the agent and the rights of the endorsee who took as a holder in due course under the reported case facts, the court permitted the agent, who did not comply with section 3-403(2)(b) requirements, to prevail.

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45. UNIFORM COMMERCIAL CODE § 3-306(b).

CRIMINAL LAW — UNEXPLAINED POSSESSION PRINCIPLE CHALLENGED ON FIFTH ADMENDENT GROUNDS*

Robert E. Young, convicted for breaking and entering with intent to commit a felony, challenged on appeal the following jury instructions as unconstitutional:

> I further instruct you, that when it is known beyond a reasonable doubt that a building has been entered and property stolen therefrom, and soon thereafter, the property is found in the possession of the persons charged with entering the building with intent to steal, such possession *unexplained* may warrant the inference that such person not only stole the goods, but that they broke and entered the building with intent to steal.[1]

The District Court of Appeal of Florida reversed his conviction on the ground that the jury charge in question had violated the defendant's fifth amendment privilege against self-incrimination.[2]

It has long been the rule in this country that the exclusive, personal, and unexplained possession of recently stolen goods may give rise to an inference of guilt.[3] This rule, which springs from English common law,[4] has been applied consistently in cases of burglary,[5] larceny,[6] and receiving stolen goods.[7] The inference recognized is not a presumption of law, but one of fact—an inference of "probable reasoning, as to which the court may lay down logical tests for the guidance of the jury, but can impose no positive binding rule."[8]

The "unexplained possession" rule has been held to justify a prosecutor's comment to the jury upon the failure of an accused

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*Young v. State, 203 So. 2d 650 (Fla. 1967).

1. Young v. State, 203 So. 2d 650 (Fla. 1967) (emphasis added).
2. *Id.*
3. 1 F. WHARTON, CRIMINAL EVIDENCE § 191, at 199 (11th ed. 1935); 9 J. WIGMORE, EVIDENCE § 2513 at 417-24 (3d ed. 1940); *see* 46 COLUM. L. REV. 460 (1946).
4. *See* Regina v. Langmead, 169 Eng. Rep. 1459, 1463 (C.C. 1864).
5. 9 AM. JUR. *Burglary* § 64 (1937).
6. 1 F. WHARTON, CRIMINAL EVIDENCE *supra* note 3.
7. Husten v. United States, 95 F.2d 168 (8th Cir. 1938).
8. 1 F. WHARTON, CRIMINAL EVIDENCE § 193, at 203 (11th ed. 1935).
9. State v. Edgeworth, 239 S.C. 10, 121 S.E.2d 248 (1961).

to explain,[9] and has properly been the subject of jury instructions.[10]

In the *Young* case, however, the jury instruction based upon this long-standing principle was held to be improper. Two factors contributed to this determination: (1) The decision of *Miranda v. Arizona*[11] which made clear the availability of the privilege against self-incrimination during custodial interrogation; and (2) the nature of Florida's interpretation of the unexplained possession rule.

In reference to the requirement that possession, in order to yield an inference of guilt, must be "unexplained," the court specified that an explanation to rebut the inference must be offered when the accused "is first under a duty to speak after such recently stolen property is found in his possession."[12]

Since *Miranda*, however, had relieved a suspect of any duty to respond to custodial interrogation, the court concluded that an inference of guilt could no longer be drawn from his failure to explain:

> The instruction given to the jury had the effect to demand of the defendant an affirmative explanation for the reason the stolen goods were in his possession. At the same time defendant being in police custodial interrogation within the meaning of *Miranda* would have had the privilege to remain silent. The privilege to remain silent would be a hollow privilege if that silence would create an inference of guilt at the trial. The fact that the defendant remained silent was used against him at trial in the form of the aforementioned jury instruction in violation of the defendant's Fifth Amendment privilege under the *Miranda* decision.[13]

Under the Florida interpretation of the unexplained possession principle, the court's finding is clearly correct. The purpose of the fifth amendment freedom from self-incrimination is not only to protect an individual from being coerced into giving evidence against himself, but also to protect him from "indirect pressure to explain incriminating evidence."[14] Now that the

10. 1 F. WHARTON, CRIMINAL EVIDENCE *supra* note 3.
11. 384 U.S. 436 (1966).
12. Young v. State, 203 So. 2d 650, 651 (Fla. 1967).
13. *Id.* at 652.
14. Note, *Adoptive Admission, Arrest and the Privilege Against Self Incrimination: A Suggested Constitutional Imperative*, 31 U. CHI. L. REV. 556, 567 (1964).

fifth amendment self-incrimination clause has become binding upon the states,[15] it is imperative that in state courts and police custody, accused persons "suffer no penalty"[16] for choosing to remain silent. This is clearly the mandate of *Miranda*[17] and the "no-comment" decisions.[18]

Referring generally to the unexplained possession rule, the *Young* court stated: "Cases . . . throughout the United States . . . [and] [f]ederal courts throughout the land have constantly adhered to this principle . . . ."[19] It would seem then, that the *Young* decision, by invalidating a principle of such widespread importance might have a drastic impact upon the field of criminal evidence. A closer examination reveals, however, that other jurisdictions have developed an alternate interpretation of the principle in question. In so doing, they have avoided the fifth amendment collision that gave rise to the *Young* decision.

Authorities indicate that the Florida version of the possession rule resembles the common law rule—that the explanation to subdue the inference of guilt must be given when the possessor is first found with the stolen goods.[20] This distinction apparently stems from the desirability of drawing an explanation from the accused party "before he has had the opportunity to concoct evidence exculpatory of himself. . . ."[21]

As this principle, was handed down through customary judicial practice over the years,[22] its original interpretation became obscured. Although the vague language of case law often left uncertain the character of the explanation required, it is now clear that an alternate version of the rule recognizes the guilt inference *only when a reasonable explanation is not forthcoming from all the evidence presented at trial.*[23]

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15. Malloy v. Hogan, 378 U.S. 1 (1964).

16. *Id.* at 8.

17. Miranda v. Arizona, 384 U.S. 436 (1966).

18. Griffin v. California, 380 U.S. 609 (1965); United States v. Lo Biondo, 135 F.2d 130 (2d Cir. 1943); State v. Wolfe, 64 S.D. 178, 266 N.W. 116 (1936); *see* 14 AM. JUR. *Criminal Law* § 150 (1937).

19. Young v. State, 203 So. 2d 650, 651 (Fla. 1967).

20. A. WILLS, CIRCUMSTANTIAL EVIDENCE 79 (1896); Annot., 101 Am. St. R. 474, 521 (1905); *see,* 1 F. WHARTON, CRIMINAL EVIDENCE § 121, at 137 (11th ed. 1935).

21. Annot., 101 Am. St. R. 474, 521 (1905).

22. *See* State v. Hodge, 50 N.H. 510, 519-20 (1869).

23. Herman v. United States, 289 F.2d 362, 367 (5th Cir. 1961) ("explained by circumstances"); Yielding v. United States, 173 F.2d 46, 48 (5th Cir. 1949) ("explanatory facts and circumstances"); Levi v. United States, 71 F.2d 353,

South Carolina, adhering to this alternate interpretation, states its position in *State v. Winter*:[24]

> The jury is not required to look for the explanation which removes the presumption to direct evidence; it may be found in the attending circumstances, or in the character or habits of the possessor or in any other fact . . . .[25]

Recognizing that the unexplained possession principle consists of these variations, it is important to remember that it was the nature of Florida's *interpretation* that necessitated the *Young* decision. The Florida rule required an explanation from the accused during initial police custody. *Miranda*, by extending the right against self-incrimination to the arrest stage, drew the Florida rule into conflict with the fifth amendment. Clearly *Miranda's* clarification of the fifth amendment's reach would not affect South Carolina's version of the rule, which requires nothing more than an *evidentiary explanation at trial.*

Further reflection, however, gives rise to this question: If it was impermissible "to demand of the defendant an affirmative explanation for the reason the stolen goods were in his possession,"[26] why is it proper to demand that he explain that same possession through the presentation of testimony and other evidence at trial? The answer proceeds from an important difference between the Florida and South Carolina interpretations: While the South Carolina rule contemplates an explanation arising out of the total circumstances of the case, the Florida rule necessarily contemplates a *verbal* explanation. The Florida Supreme Court recognized this necessity in *Ard v.*

354 (5th Cir. 1934) ("explanatory facts and circumstances"); State v. Hodge, 50 N.H. 510, 526 (1869) ("explanatory evidence"); State v. Winter, 83 S.C. 153, 156-57, 65 S.E. 209, 210 (1909) ("[T]he law . . . presumes him to be the thief, unless the jury find in the whole case as presented them some satisfactory explanation of the possession. . . ."); 9 J. WIGMORE, EVIDENCE § 2513, at 417 (3d ed. 1940) [Defendant had burden of "producing evidence, so that if he failed to do so (that is, to offer any 'explanation') the jury must convict . . . ."]; A. WILLS, CIRCUMSTANTIAL EVIDENCE 83 (1896); 32 AM. JUR. *Larceny* § 143 (1941).

24. 83 S.C. 153, 65 S.E. 209 (1909).

25. *Id.* at 156, 65 S.E. at 210. The language of other South Carolina cases is less clear. *See* State v. Edgeworth, 239 S.C. 10, 121 S.E.2d 248 (1961); State v. Coleman, 226 S.C. 617, 86 S.E.2d 484 (1955); State v. Goodson, 225 S.C. 418, 82 S.E.2d 804 (1954); State v. Washington, 220 S.C. 442, 68 S.E.2d 400 (1951); State v. Shields, 217 S.C. 496, 61 S.E.2d 56 (1950); State v. Lyles, 211 S.C. 334, 45 S.E.2d 181 (1947); State v. Baker, 208 S.C. 195, 37 S.E.2d 525 (1946); State v. Garvin, 48 S.C. 258, 26 S.E. 570, (1896).

26. Young v. State, 203 So. 2d 650, 652 (Fla. 1967).

State:[27] "The account by one discovered with purloined property must be 'directly' given in order for the explanation to be one falling within the rule."[28]

The importance of this requirement derives from the fact that the fifth amendment prohibition has historically been directed toward "testimonial compulsion"[29] as opposed to the conduct or actions of the defendant. While Florida's version represents a testimonial explanation, the South Carolina rule recognizes an explanation forthcoming from physical evidence, the testimony of other witnesses, and other facts and circumstances in the case. There is ample authority for the proposition that the fifth amendment's proscription against penalizing the accused for failure to testify does not prohibit the drawing of an inference of guilt from his failure to produce evidence at trial[30] or from the failure to call witnesses in his favor.[31]

The authorities cited for the proposition that a guilt inference can properly be drawn from failure to present witnesses and evidence, provide a useful analogy to the present question. Those cases, however, involve *specific* items of evidence and *specific* witnesses—known to be available to the defendant—which he nevertheless refuses to present at trial. Thus the prosecutor might ask the jury, "If the defendant was with his wife on the night of the murder, why did he not bring her into court to testify?" According to the weight of authority, this comment would be allowed, as the jury would be free to infer guilt from the defendant's failure to bring an *apparently available* witness into court.[32] On the other hand, if the prosecutor is allowed to comment in general language upon the failure of the defendant to explain in court his possession of stolen goods, or if the judge charges that the jury may infer guilt from such failure, it is possible that the jury might interpret this comment or instruc-

27. 108 So. 2d 650, 652 (Fla. 1959).

28. *Id.* at 41.

29. 22A C.J.S. *Criminal Law* § 649 (1961); *see* State v. Fisher, 242 Ore. 419, 410 P.2d 216 (1966).

30. 8 J. WIGMORE, EVIDENCE § 2273, at 445 (McNaughton Rev. ed. 1961); 23A C.J.S. *Criminal Law* § 1099 (1961); 22A C.J.S. *Criminal Law* § 594 (1961).

31. Ford v. State, 184 Tenn. 443, 201 S.W.2d 539, 541 (1945); 23A C.J.S. *Criminal Law* § 1099 (1961). *See also* State v. Ackerman, 90 Wash. 198, 155 P. 743 (1916); State v. Jackson, 83 Wash. 514, 145 P. 470 (1915); 16 C.J. *Criminal Law* § 2249 (1918).

32. *See* 22A C.J.S. *Criminal Law* § 594 (1961).

tion as referring to the defendant's failure to testify.[33] Therefore it is essential to the proper application of the South Carolina rule that the jury clearly understand that they may consider as incriminating, indicia and non-production of evidence *except* the refusal of the defendant to testify.[34]

In conclusion it should be noted that there is a corollary to the unexplained possession rule which remains in force even under the Florida interpretation: If the accused offers an explanation that proves either flimsy[35] or untrue[36] a strong inference of guilt arises. He might otherwise waive the privilege[37] in which case the inference may arise regardless of which rule is applied. Apparently these exceptions represent the only aspects of the Florida rule which have survived the *Young* decision.

The decision in the *Young* case should have no direct effect on the South Carolina rule. It does serve, however, to bring attention to the uncertain and ever-changing nature of this area of the law.[38] While such uncertainty renders increasingly clear the need for care and deliberation on the part of the trial judge, general authority predicts that the South Carolina rule will remain in effect with no immediate fifth amendment confrontation.

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33. *See* 23A C.J.S. *Criminal Law* § 1098 (1961).

34. *See*, 8 J. WIGMORE, EVIDENCE § 2273 (McNaughton Rev. ed. 1961); State v. Hodge, 50 N.H. 510, 527-29 (1869).

35. Romanello v. State, 160 So. 2d 529, 534 (Fla. Ct. App. 1964), *cert. denied*, 381 U.S. 915 (1965).

36. A. WILLS, CIRCUMSTANTIAL EVIDENCE 86 (1896).

37. *See* note *Miranda and Waiver*, 4 WILLIAMETTE L.J. 205 (1966).

38. *See* note, *Real Evidence and the Privilege Against Self-Incrimination*, 4 WILLIAMETTE L.J. 218 (1966).

CRIMINAL PROCEDURE — PROHIBITION AGAINST SELF-INCRIMINATION UNDER THE FEDERAL WAGERING TAX STATUTES*

The petitioner, Marchetti, was convicted in the United States District Court of Connecticut under two indictments: First, that the petitioner and others conspired to evade payment of the annual occupational tax imposed by Title 26, Section 4411 of the United States Code; second, that petitioner willfully refused to pay the occupational tax and to register his gambling activities as required by Title 26, Section 4412 of the United States Code before engaging in the business of accepting wages. The Court of Appeals for the Second Circuit affirmed[1] on the authority of *United States v. Kahriger*[2] and *Lewis v. United States*.[3] In overruling *Kahriger* and *Lewis*, the Supreme Court in *Marchetti v. United States*[4] held that the scheme of the gambling tax statute violated the petitioner's privilege against self-incrimination and hence that no criminal prosecution arising from a violation of the taxing statute could be sustained against the petitioner.

In *Marchetti* the Court confronted four issues, all of which were related to self-incrimination.

First, the Court had to consider the determination made in *Kahriger* and *Lewis* that the gambling tax statute was prospective in its application and the privilege against self-incrimination did not attach to prospective acts.

Second, the Court had to consider the alternative holding in *Kahriger* and *Lewis* that an individual waives his privilege against self-incrimination by entering into the field of gambling.

Third, the court had to decide whether the information required was subject to the "required records" doctrine enunciated in *Shapiro v. United States*.[5]

Fourth, the Court had to determine whether the doctrine of immunity arising from *Murphy v. Waterfront Commission*[6] could be made applicable to the facts in *Marchetti*. The Court acknowl-

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*Marchetti v. United States, 88 S. Ct. 697 (1968).

1. United States v. Marchetti, 352 F.2d 848 (2d Cir. 1965).
2. 345 U.S. 22 (1953).
3. 348 U.S. 419 (1955).
4. 88 S.Ct. 697 (1968).
5. 335 U.S. 1 (1948).
6. 378 U.S. 52 (1964).

edged *Murphy* and the fact that the present gambling tax statute contained no immunity provision. The issue, therefore, was whether the court could grant immunity to the defendants from federal and state prosecution when the statute had no immunity provision.

Because of the complexity and confusing nature of these issues, each will be discussed separately in an attempt to analyze the application of these concepts to the all-encompassing issue of self-incrimination.

I. PROSPECTIVE ACTS

The court in *United States v. Kahriger* held that the gambling tax statute was valid because the prospective gambler would not engage in wagering activities until after he had complied with the gambling statute. And, at the time of registering, therefore, the petitioner had committed no overt act to which the privilege against self-incrimination could attach. By this holding, the Court established a rigid chronological test; namely, that the privilege against self-incrimination applies to past and present acts[7] but does not apply to future acts.

The *Marchetti* Court recognized, however, that this test fails to meet certain constitutional standards.

First the danger of self-incrimination need not arise from evidence which directly incriminates. It need only present a link in the chain which could eventually lead to a conviction.[8]

It is logical to conclude that the disclosure sections of the gambling statute would provide a "link in the chain" to future prosecutions. Because of this conclusion, the chronological rigidity of a "prospective acts" test fails to shield the individual from self-incrimination. In order to document this holding, the *Marchetti* Court pointed to the unity of the states in combatting gambling activities.[9] State authorities could use the information obtained through the registration requirement of the

7. *See also* Communist Party v. United States, 331 F.2d 807 (D.C. Cir. 1963), *cert. denied*, 337 U.S. 968 (1964); Russell v. United States, 306 F.2d 402 (9th Cir. 1962) (cannot require registration of illegally possessed firearms if the registration will bring to the attention of the government the unlawful act of possession).

8. Hoffman v. United States, 341 U.S. 479 (1951); Blau v. United States, 340 U.S. 159 (1950).

9. 88 S.Ct. 697, 701 & n. 5, 6 (1968).

statutes[10] to alert themselves to the intention of the individual who registered. By closely scrutinizing the activities of this individual, the state authorities could arrest him when he did engage in his gambling activities and initiate a criminal prosecution against him. Thus, even though an individual's gambling activities are to be carried out at some future point in time, the fact that he is made to disclose his future intentions provides a "link in the chain" which might lead to his conviction when he does begin his gambling activities.

The Court also pointed out that a criminal prosecution may arise from the link of evidence provided by the gambling statute although an individual decides not to enter into wagering activities. A person may be convicted under state law in some jurisdictions if he *conspires* to enter into wagering activities.[11] In this situation, the overt act of gambling is prospective yet the individual is prosecuted criminally because of the link of evidence supplied by the disclosure sections of the gambling act which indicate an individual's desire to gamble in the future.

The *Marchetti* Court made a further attack on the prospective acts test. The Court conceded that in order for the privilege against self-incrimination to attach, an individual must suffer a real and not merely an imaginary possibility of self-incrimination.[12] In other words, if the possibility of self-incrimination is too remote, the privilege will not attach. The Court, however, had only to look at past judicial decisions to recognize that the gambling statutes had been used previously to secure criminal convictions and therefore posed a real threat of self-incrimination to potential gamblers.[13] With this finding of fact, the Court held that although the act of gambling is subsequent to the date

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10. 26 U.S.C. § 6806(c) (1964) (posting revenue stamps in their place of business or keeping them on their person to be exhibited on demand by a treasury official); 26 U.S.C. §§ 4403, 4423 (1964) (requiring daily records of gross amount of wages received and permitting inspection of these books or records); 26 U.S.C. § 4422 (1964) (payment of the wagering tax does not exempt person from any penalty under the laws of the United States or any state); 26 U.S.C. § 6107 (1964) (requiring each internal revenue office to maintain a list of occupational taxpayers for public inspection and to provide a certified copy of these listings to any state or local prosecuting officer).

11. Acklen v. State, 196 Tenn. 314, 267 S.W.2d 101 (1954).

12. *See,* Rogers v. United States, 340 U.S. 367 (1951); Mason v. United States, 244 U.S. 362 (1917); Brown v. Walker, 161 U.S. 591 (1898).

13. *See, e.g.,* Irwin v. California, 347 U.S. 128 (1954); United States v. Zizzo, 338 F.2d 577 (7th Cir. 1964); Acklen v. State, 196 Tenn. 314, 267 S.W.2d 101 (1954).

of registration and such act is therefore prospective, an individual is threatened with a real possibility of self-incrimination, and because of this threat, the disclosure provisions of the statute violate an individual's fifth amendment privilege against self-incrimination.

In cases in which the privilege against self-incrimination is invoked, "[s]ociety's interest in having a full disclosure of all criminal activity must be balanced against the right of the individual to be free from unrestrained government inquisition."[14] A rigid chronological test under the circumstances of the *Marchetti* case will not provide this protection. Although the act of gambling is prospective with respect to the filling out of the disclosure provisions of the gambling statute, such disclosure, is most instances, will invariably result in a criminal conviction.

II. WAIVER

The Constitution grants certain rights and privileges to individuals who are citizens of the United States, and no act or manifestation of intention is required of the individual in order to have these rights and privileges attach. The privilege against self-incrimination is one of the rights bestowed upon individuals.

These privileges can, however, be waived by an individual if certain conditions occur. The Supreme Court has held that the privilege against self-incrimination is one of the constitutional guarantees which can be waived.[15]

Although the privilege against self-incrimination can be waived, the Court presumes against waiver.[16] To prevent the unwary from inadvertently waiving his constitutional rights, the Court has generally applied the test that in order for there to be a waiver, an individual must have "meaningfully" waived his rights.[17]

The courts have been able to set certain standards by which the test of "meaningful" has been applied. Through the judicial

14. McKee, *The Fifth Amendment and the Federal Gambling Tax*, 5 DUKE B.J. 86, 86 (1956).

15. *See, e.g.*, Redfield v. United States, 315 F.2d 76 (9th Cir. 1963) (waiver by testimony); United States v. Field, 193 F.2d 92 (2d Cir.), *cert. denied*, 342 U.S. 894 (1951) (waiver by contract).

16. Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937); Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292 (1937); Hodges v. Easton, 106 U.S. 408 (1882).

17. *Cf.* Carnley v. Cochran, 369 U.S. 506 (1962); Johnson v. Zerbst, 304 U.S. 458 (1938).

process the standards have adequately covered most express waivers; that is, a case in which the individual has expressed an affirmative intention to disclaim a constitutional right or privilege. The *Marchetti* Court, however, was faced with a far more difficult problem—the problem of an implied waiver.

An implied waiver occurs by operation of law. Because of an individual's participation in certain acts, the law states that he has disclaimed his constitutional right. Thus, the difference between an express waiver and an implied waiver is that in the former, the individual waives his protection under the privilege and in the latter his protection is waived by operation of the law.

The Court in *Marchetti* was faced with the authority of two prior decisions in deciding the issue of whether the petitioner had impliedly waived his privilege against self-incrimination.

First, in *United States v. Sullivan*,[18] the petitioner failed to file his income tax form because a portion of his income came from activities which violated the National Prohibition Act. In an attempt to justify his refusal to comply, the petitioner asserted his privilege against self-incrimination. The Court decided that the petitioner could not refuse to file a return under the cover of the privilege. Instead, the Court asserted, the petitioner should have filed his return claiming his privilege to the specific question asked by the form which tended to incriminate him. By not filing his return, the Court held that he had waived his privilege to the information required by his income tax return.

The *Marchetti* decision, on the other hand, followed the presumption against waivers of constitutional rights as its basic premise. It reasoned that if the petitioner had to claim his privilege at the time of registration, he would be admitting his guilt in order to claim the privilege. Since an individual can assert the privilege at trial and the petitioner did assert his privilege at that time, the Court held that there had been no previous "meaningful" waiver of the privilege. The petitioner had performed all of the duties required in asserting the defense of the privilege.

Second, in *Lewis v. United States*,[19] under facts very similar to those of the *Marchetti* case, the Court found an implied waiver

18. 274 U.S. 259 (1927).
19. 348 U.S. 419 (1955).

of the privilege against self-incrimination. The Court stated that there was no constitutionally protected right to gamble. Therefore, the petitioner had a choice: to engage in gambling or to refrain from gambling. If he chose the former, his rights under the privilege were waived in respect to the information required under the disclosure provisions of the gambling statute. The Court, therefore, found an implied waiver if an individual chose to gamble. The *Marchetti* Court overruled *Lewis*, holding that there had been no "meaningful" waiver. Because there is no constitutionally protected right to gamble, it does not necessarily follow that the privilege against self-incrimination does not attach to an individual engaged in gambling. Both guilty and innocent parties, the Court asserted, are protected by the privilege unless they have meaningfully waived their privilege.[20] In fact it is primarily the accused who is in need of the privilege.

The *Marchetti* Court could have taken another step toward strengthening its position against implied waivers. *Rogers v. United States*,[21] held that if an individual testifies as to fact, he waives the privilege as to detail surrounding that fact. The Court could have accepted this rule and held that the petitioner in refusing to register specifically reserved his privilege. Had the petitioner admitted his gambling activities, he would, at the same time, have been waiving his right with respect to the details surrounding his activities. By not submitting his intentions of gambling, however, the petitioner could have expressly reserved his privilege pertaining to those facts surrounding his activities. Although failing to encompass *Rogers*, *Marchetti* rejected *Sullivan* and *Lewis*, and in effect, refused to accept waiver by implication. After *Marchetti* the only method in which to waive meaningfully is to waive expressly and intelligently one's rights to constitutional protections and privileges.

By rejecting the implied waiver theory, *Marchetti* has narrowed the ability of prosecutors to by-pass this personal defense and has broadened the scope of the privilege in protecting the individual. As stated in *United States v. White*,[22] "the immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on

20. 88 S. Ct. 697, 704 (1968).
21. 340 U.S. 367 (1951).
22. 322 U.S. 694 (1944).

society in the detection and prosecution of crime."[23] The Court has removed one of the obstacles obstructing the practical application of this quote.

Having considered the application of the waiver theory in *Marchetti*, the question now arises: Is the test of "meaningfulness" used by *Marchetti* restricted to this particular factual situation or will this rejection of implied waiver filter into other self-incrimination areas? With the Court's emphatic desire to protect the individual's constitutional rights and its apparent abhorrence of waiver of constitutional rights, it is more than mere speculation to assume that this rejection of implied waiver of the privilege will be carried into other areas. If such an extension is not made, an individual's privilege against self-incrimination could be watered down to uselessness by "ingeniously drawn legislation"[24] as attempted in *Marchetti*.

III. REQUIRED RECORDS DOCTRINE

The "required records doctrine" states basically that in some instances, records must be kept and handed over to proper authorities on demand, whether they will incriminate an individual or not. If the records involved do come within this category, the privilege against self-incrimination does not attach to their contents. To understand the doctrine, a brief survey of its development will be helpful.

In *Boyd v. United States*, [25] the privilege against self-incrimination was held to attach to books and papers of individual citizens. The use of these documents by the government was held to be repugnant to the fourth and fifth amendment guarantees against unlawful search and seizure and self-incrimination.

With the increasing need of government regulations, the *Boyd* decision was later limited to "natural persons,"[26] and did not apply to organizations. The Court later declared that the privilege did not attach to corporate documents,[27] documents of labor

23. *Id.* at 698.

24. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 37 (1949).

25. 116 U.S. 616 (1886).

26. *See* United States v. White, 322 U.S. 694 (1944); Communist Party v. Subversive Activities Control Bd., 223 F.2d 531 (D.C. Cir. 1954), *rev'd on other grounds*, 351 U.S. 115 (1956).

27. United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944).

unions, [28] and documents of partnerships.[29] As previously stated, these restrictions on the availability of the privilege against self-incrimination were upheld although the custodians of the documents might have been incriminated by the contents. The Court, moreover, has reasoned that a custodian of documents could not claim that the documents were private only to himself and therefore could not claim the privilege to them because an individual may claim the privilege only as to property which is private to himself.[30]

By interjecting these two tests—whether the property being required was the private property of the individual asserting his privilege against self-incrimination, and whether the property being required belonged to a natural person—the government was able to enforce many of their regulatory programs.

The reasoning flowing from this line of cases was expanded in *Shapiro v. United States*.[31] By declaring that records required by law to be maintained by an individual acquired "public aspects,"[32] the Court held that the privilege did not attach, because the individual did not have a completely vested interest in the documents and, therefore, became only the custodian of the documents.[33] This interpretation espoused in *Shapiro* has become known as the "required records doctrine."

The question facing the *Marchetti* Court was whether the records required of the petitioner fit into the "required records doctrine." The Court distinguished the present set of circumstances from those circumstances involved in *Shapiro*. In *Shapiro* the required records were "of a kind ordinarily kept."[34] In contrast the petitioner, Marchetti, was required to keep records which were automatically going to subject him to a criminal prosecution. The records ordered to be kept in the *Shapiro* case would not incriminate an individual *unless* he subsequently entered into an illegal activity. In *Marchetti*, the petitioner was

28. United States v. White, 322 U.S. 694 (1944).

29. United States v. Silverstein, 314 F.2d 789 (2d Cir.), *cert. denied*, 374 U.S. 807 (1963).

30. United States v. White, 322 U.S. 694 (1944); Wilson v. United States, 221 U.S. 361 (1911); Boyd v. United States, 116 U.S. 616 (1886).

31. 335 U.S. 1 (1948).

32. *Id.* at 33-34.

33. *Compare* Shapiro v. United States, 335 U.S. 1 (1948), *with* United States v. White, 322 U.S. 694 (1944).

34. 335 U.S. 1. 31 (1948).

guilty of a crime before he entered into his gambling activities. To require someone to keep incriminating records, in effect, results in a coerced confession; and coerced confessions should never result from records "of a kind ordinarily kept."

Furthermore, the *Marchetti* Court pointed out that the government's desire to obtain information does not, in itself, cause records to take on "public aspects" of the kind found in *Shapiro*. If this desire alone was enough to bring certain records into the *Shapiro* rule, the government could pass legislation similar to the gambling statutes; and by requiring information to be given to government officials, the privilege against self-incrimination could be reduced to a nullity by the Congress.[35]

The Court in *Marchetti* pointed out a further distinguishing characteristic between *Shapiro* and *Marchetti*. The information required in *Shapiro* was aimed at an area which was essentially non-criminal, whereas the information required in *Marchetti* came from an area essentially criminal in nature.[36] It is worth noting this distinction for two reasons: First, it simply gave the *Marchetti* Court a reason to distinguish its case and bring it outside of the "required records doctrine"; second, and possibly more important, the Court appears to indicate that it will look closely at an area invaded by legislative acts when that area involves a possible criminal sanction. In this case, the Congress has the power to tax. It used this power, however, to acquire information leading to criminal convictions. It is difficult to determine if the court will apply this reasoning to other situations in which a governmental agency has entered into a criminal area under the pretense of another legitimate reason. Since the Court did not adequately distinguish *Shapiro* nor set limits for its application, it could reasonably be assumed that *Shapiro* has been overruled sub silentio, at least when its application is challenged under the fifth amendment.

IV. Immunity and the Dual Sovereignty Rule

Simply stated, dual sovereignty provides that the states and the federal government are separate and equal entities. Under this formulation determinations by one sovereign will not necessarily bind the other. This rule has been applied distinctly in the area of criminal procedure.

35. 88 S. Ct. 697, 707 (1968).
36. *Id.*

In the area of self-incrimination, the question of dual sovereignty customarily arises in the following context. Either a state or the federal government will pass a law which requires an individual to turn over certain materials to the authorities or to give testimony pertinent to specific issues to certain judicial or quasi-judicial authorities. In order to prevent running afoul of the self-incrimination guarantee granted to the testifying witness, the federal or state statute requiring disclosure will contain an immunity provision which will prohibit a prosecution of the witness by using the evidence given in testimony as a basis for such prosecution. Under the dual sovereignty rule, however, the other sovereign, either the state or the federal government, would not be affected by the respective immunity statute and could, therefore, use the evidence acquired by the other sovereign to prosecute the defendant under its own laws.

In *Counsel v. Hitchcock*,[37] the Court addressed itself only to the validity of an immunity statute. There it was held that the National Immunity Act[38] was not broad enough to protect the individual's privilege against self-incrimination, and that the individual could not be forced to give testimony.

Four years later, the court reversed its decision and held that the National Immunity Act of 1893 was broad enough to protect the individual's privilege, therefore, the individual could be forced to testify.[39]

These two early cases were not involved with dual sovereignty however, and had not decided whether a grant of immunity by one sovereign would bind the other sovereign. The Court had been concerned only with the question of whether an individual could be forced to give testimony when an immunity provision, granted by the sovereign initiating the questioning, provided for protection against prosecution by the sovereign arising from the testimony which was given.

In *Ballman v. Fagin*[40] the Court was confronted with the issue of dual sovereignty. The defendant was subpoenaed to appear before a federal grand jury to present certain testimony. He pleaded his fifth amendment privilege against self-incrimination contending that if he gave this evidence, he would be sub-

37. 142 U.S. 547 (1892).
38. National Immunity Act, 15 Stat. 37 (1868).
39. Brown v. Walker, 161 U.S. 591 (1896).
40. 200 U.S. 186 (1906).

jecting himself to state prosecution. Justice Holmes, speaking for the majority, held that the defendant's contention was valid and that he could not be made to testify.

In *United States v. Murdock*,[41] however, the Court specifically adopted the dual sovereignty rule when it stated that the federal government could compel a witness to give testimony which might be used against him in a state proceeding.

Following the rule stated in *Murdock*, the Court, in *Feldman v. United States*[42] held that a state may force disclosure from an individual which may later result in a criminal prosecution in a federal proceeding. In *Knapp v. Schweitzer*,[43] the Court affirmed its position pertaining to the dual sovereignty rule as applied in *Feldman*.

It should be understood that the dual sovereignty rule was applicable even though a state or the federal government had granted an immunity to the testimony given. The sovereign which granted the immunity was bound, but the sovereign granting the immunity could not bind the other sovereign by enacting an immunity provision.

Certain inroads, however, were subsequently made on the dual sovereignty rule. In *Adams v. Maryland*,[44] the Court implied that a national immunity provision could be passed which would bar a subsequent state criminal proceeding using the evidence acquired by the federal government. Later, in *Mills v. Louisiana*,[45] the dissent argued that when there was collaboration between state and federal authorities for the purpose of obtaining testimony from a witness in a state proceeding, the federal authorities should be barred from using this testimony in a federal prosecution. The dissent argued that this element of collaboration would enable the state and federal authorities to circumvent an individual's privilege against self-incrimination.

These cases were decided before the federal standard of protection under the fifth amendment privilege against self-incrimination was applied against the states. Until this time, the states

41. 290 U.S. 389 (1933).
42. 322 U.S. 487 (1944).
43. 357 U.S. 371 (1958).
44. 347 U.S. 179 (1954). *See also* Brown v. Walker, 161 U.S. 591 (1896).
45. 360 U.S. 230 (1959).

were bound by their own constitutional self-incrimination clauses and the federal government was bound by the fifth amendment.

In 1964 the Court decided *Malloy v. Hogan*[46] and the fifth amendment privilege was incorporated into the fourteenth amendment's due process clause. For the first time the states and the federal government had the same standard to be used in applying the privilege against self-incrimination.

It was no longer practical to apply dual sovereignty in the area of self-incrimination because the standard for applying the privilege was the same in both state and federal governments. Therefore, if an individual had a valid defense under the privilege in either a state or federal proceeding, the other sovereign could not use this testimony due to the Court's incorporation of the fifth amendment privilege into the fourteenth amendment.

Logically following this abolition of the dual sovereignty rule, the Court, in *Murphy v. Waterfront Commission*,[47] held that both states and federal immunity statutes would operate to give immunity to an individual against a subsequent prosecution in the jurisdiction of the other sovereign. If the standard of applying the privilege was to be the same in both federal and state prosecutions, an immunity statute granted by one sovereign should operate against the other sovereign.

The *Marchetti* decision, however, refused to read an implied immunity provision into the gambling tax statute.[48] Reasoning that it is the duty of the Congress to enact laws, the Court stated that it could not upset the scheme of the statute by implying an immunity provision. To do so, would have destroyed the congressional intent to have the information disclosed under the gambling statute made available to state authorities.[49] Instead, the Court left the duty of amending the statute to meet constitutional requirements to the Congress, while implying that an immunity provision would save the statute.

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46. 378 U.S. 1 (1964).

47. 378 U.S. 52 (1964).

48. 88 S. Ct. 697, 708-09 (1968). It is submitted that, as a practical matter, the Court did not imply an immunity, for to do so would have had the effect of destroying state gambling legislation.

49. 26 U.S.C. § 6107 (1964) (provides for the turning over of information obtained as a consequence of registration and payment of the occupational tax to prosecuting authorities).

> If Congress should hereafter conclude that a full disclosure . . . by the witness is of greater importance than the possibility of punishing them for some crime in the past, it can, as in other cases, confer power of unrestricted examination by providing complete immunity.[50]

V. CONCLUSION

The Court in *Marchetti* had to struggle with four aspects of self-incrimination in concluding that the petitioner's privilege had been violated. First, the Court adhered to the philosophy that the constitutional privilege could not be restricted by a rigid chronological test. The guarantee is to be applied liberally in procuring the protecting of the individual. Second, the Court concluded that in order to find a waiver of the constitutional guarantee of the privilege against self-incrimination, the waiver at least under the facts of this particular case, cannot be implied. It must, moreover, be "meaningfully" waived. Third, the Court held that the facts of the case were not within the "required records doctrine" because to do so would enable Congress to demand all records sought for any reason. Fourth, the Court would not apply an immunity provision within the gambling statute in order to save it, leaving this determination to the Congress.

There is no doubt that the Congress may levy taxes and an incidental regulatory effect will not cause the tax to be stricken as being unconstitutional.[51] The intent of tax laws, however, must be to raise revenues and not to penalize.[52]

Considering the surrounding circumstances, the Court, in effect, held that the gambling tax statute was instituted for the purpose of enabling the states to improve enforcement of their criminal prohibitions against gamblers.[53] The *Marchetti* deci-

50. McCarthy v. Arndstein, 266 U.S. 34, 42 (1924).

51. *See* McCray v. United States, 195 U.S. 27 (1904); Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).

52. United States v. Constantine, 296 U.S. 287 (1935). *See also* United States v. One Ford Coupe, 272 U.S. 321 (1926); United States v. Stafoff, 260 U.S. 477 (1923).

53. 97 CONG. REC. 12232 (1951) (discussion by Senator Kefauver on how to combat illegal gambling activities); 97 CONG. REC. 6891 (1951) (colloquy between representatives Cooper and Hoffman on how to combat illegal gambling activities). *Compare* Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. Butler, 297 U.S. 1 (1963); *with* the fact that the gambling stamp could be purchased for $50.00 and represented only nominal revenues tending toward the presumption that the tax statute was not passed for the primary purpose of collecting revenues.

sion "echoed" the dissent of Justice Black and Justice Douglas in *Kahriger* that the gambling tax statute was put into effect as "a squeezing device contrived to put a man in federal prison if he refuses to confess himself into state prison . . . ."[54]

The extent to which the *Marchetti* decision will be broadened in the future cannot be presently answered. It is, however, feasible to contend that when legislation is enacted toward a group of individuals engaged in "an area permeated with criminal statutes," and "inherently suspect of criminal activities"[55] the Court will look for a protection of the individual's privilege against self-incrimination within the statutory scheme. Without such protection, the statute will probably be stricken.

> The question, however, remains whether this ideal of the individual's immunity from coerced prosecution can be reconciled with the governmental need for information in a complex modern society.[56]

MICHAEL W. SMITH

54. 345 U.S. 22, 36 (1953).

55. Marchetti v. United States, 88 S. Ct. 697, 702 (1968); Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965).

56. Note, *Required Information and the Privilege Against Self-Incrimination*, 65 COLUM. L. REV. 681, 683 (1965).

FEDERAL TAXATION—EFFECT OF A PREVIOUS STATE TRIAL COURT'S DETERMINATION OF A PROPERTY INTEREST IN A FEDERAL COURT TAX CONTROVERSY*

During the past three decades a conflict has developed among the federal circuits with respect to the degree to which the federal authorities, in a federal tax controversy, are required to follow the state *trial* court's determination of a property right created under the state law. The United States Supreme Court has determined that the revenue laws are to be construed in the light of their general purpose in order to establish a nation-wide scheme of taxation which is uniform in its application.[1] When Congress imposes a federal criterion with respect to the taxability of income or property, moreover, the federal authorities are "not bound by a state court's decision with respect to whether the federal test . . . has been met."[2] On the other hand, the Supreme Court has recognized that the "necessary implication" of the applicable statute might require that state law govern property rights with respect to whether the particular item was intended to be taxed. If Congress fixes a tax on the possibility of the revesting of property or the distribution of income, the "necessary implication" is that the state law is to determine the possibility because the power to transfer or distribute assets is created by state law.[3] The Court, however, has placed a general qualification upon this state control:[4]

> [S]tate law creates legal interests and rights. The federal revenue acts designate what interest, or right, so created

* Commissioner v. Bosch, 387 U.S. 456 (1967).

1. United States v. Pelzer, 312 U.S. 399, 402 (1941).

2. Gallagher v. Smith, 223 F.2d 218, 222 (3d Cir. 1955). *See also* Helvering v. Stuart, 317 U.S. 154, 161-62 (1942); Goodwin's Estate v. Commissioner, 201 F.2d 576 (6th Cir. 1953). In Falk v. Commissioner, 189 F.2d 806 (3d Cir. 1951) the court said of the monies received by the taxpayer for the purposes of distributing to charities, that it was a federal question and that "the orphans' court cannot . . . decide issues of federal tax law and thus hamper the effective enforcement of a valid federal tax levied against earned income." *Id.* at 810.

3. Helvering v. Stuart, 317 U.S. 154, 161-62 (1942); United States v. Pelzer, 312 U.S. 399 (1941); Freuler v. Helvering, 291 U.S. 35 (1934). *See also* Cahn, *Local Law in Federal Taxation*, 52 YALE L. J. 799 (1943), which stated "[i]f the federal courts eventually do assume exclusive jurisdiction, they will find state law indispensible as to the meaning and effect of individual wills, even as to the purport of a clause directing apportionment of the tax." *Id.* at 813.

4. Morgan v. Commissioner, 309 U.S. 78 (1940).

> shall be taxed. . . . If it is found in a given case that an interest or right created by local law was the object intended to be taxed, the federal law must prevail no matter what name is given to the interest or right by state law.[5]

In order to understand recent Supreme Court developments, this federal-state controversy should be discussed through a brief analysis of the conflict among the circuits.

I. THE PROBLEM—HISTORICAL ASPECTS

It has been recognized that the character of a property right may have a direct effect upon the tax consequences in a federal tax controversy and that state law may be used to determine the property rights of the parties involved. Which judicial authority makes this determination of the property rights, however, has led to much confusion. In developing an answer, courts have asked themselves the question: Was the federal authority conclusively bound by the decision of a state *trial* court as to the property rights of the parties? If they were not conclusively bound, in what situations were the authorities to adhere to the decisions of a state *trial* court?

Freuler v. Helvering[6] was the first major case to involve reliance on a state *trial* court's decision in the adjudication of a federal tax question. The Supreme Court viewed the decision of the lower court of the state as a "declaration of the law of the State," even though the decision was not based on a statute or an earlier decision.[7] The Court subsequently reaffirmed its position in *Blair v. Commissioner*.[8] In determining the validity of an assignment of income under a testamentary trust, the Court took the position that the "decision of the state court" must be accepted as controlling so far as it is found that the local law is determinative of any material point in controversy.[9]

In both *Freuler* and *Blair*, however, the Supreme Court indicated that the state proceeding was not controlling when it was collusive "in the sense that all parties joined in a submission of

5. *Id.* at 80, 81.
6. 291 U.S. 35 (1934).
7. *Id.* at 45.
8. 300 U.S. 5 (1937).
9. *Id.* at 9.

the issue and sought a decision which would adversely affect the Government's right to additional . . . taxes."[10]

The federal circuits generally agree that they are not bound by a state court's decision on a material point in controversy if it is determined that the state *trial* court's decision was obtained by collusion or fraud.[11] Under these circumstances the courts will usually make an independent investigation regarding the proper state law with respect to the federal question at hand. Since the *Freuler* and *Blair* decisions, however, the circuit courts have established individual criteria absent collusion, for determining the effect that should be given to a decision of a state trial court.

In *Gallagher v. Smith*[12] the Court of Appeals for the Third Circuit held that when federal tax liability is governed by state property law, and if the issue is fairly presented to the state court for an independent judgment, if the judgment is binding upon the parties under state law, it is conclusive of the property rights in federal tax cases "regardless of whether the parties occupied adversary positions in the state court or were all on the same side of the question."[13]

In *Faulkerson v. United States*[14] the Seventh Circuit refused to adhere to the judgment of the state court because it determined that, under the circumstances, the judgment was contrary to Indiana state law.[15] This decision was later interpreted to have reached the opposite conclusion than that reached in *Gallagher*.[16]

In a third approach *Pierpont v. Commissioner* [17] held that the state trial court adjudication is binding only in cases in which

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10. Peyton's Estate v. Commissioner, 323 F.2d 438, 444 (8th Cir. 1963). *See generally* Blair v. Commissioner, 300 U.S. 5 (1937); Freuler v. Helvering, 291 U.S. 35 (1934).

11. *E.g.*, Pierpont v. Commissioner, 336 F.2d 277 (4th Cir. 1964); Peyton's Estate v. Commissioner, 323 F.2d 438 (8th Cir. 1963); Darlington v. Commissioner, 302 F.2d 693 (3d Cir. 1962); Faulkerson v. United States, 301 F.2d 231 (7th Cir. 1962).

12. 223 F.2d 218 (3d Cir. 1955).

13. *Id.* at 225. *See also* Darlington v. Commissioner, 302 F.2d 693 (3d Cir. 1962); Goodwin v. Commissioner, 201 F.2d 576 (6th Cir. 1953).

14. 301 F.2d 231 (7th Cir. 1962).

15. *Id.* at 232. In this case the judgment was entered in a state court in *ex parte* proceedings, without notice to anyone, without appearances, without a hearing on the merits and without reference to other provisions of the will. *See also* Stallworth v. Commissioner, 260 F.2d 760 (5th Cir. 1958); Sweet v. Commissioner, 234 F.2d 401 (10th Cir.), *cert. denied*, 352 U.S. 878 (1956).

16. Commissioner v. Bosch, 387 U.S. 456 (1967).

17. 336 F.2d 277 (4th Cir. 1964).

the judgment is the result of an adversary proceeding in the state trial court.[18]

In effect some courts made independent determination of property rights while some circuits accepted state court decisions only when the proceedings were adversary in nature. Others asserted that if the state adjudication was binding upon the parties as to their property rights, then it was also binding on the federal authorities.

In *Peyton's Estate v. Commissioner*[19] a federal district court clarified the latter position stating that a non-adversary character of a state court's proceeding does not show collusion; but rather that the non-adversary character is relevant evidence to be considered by the federal authorities. The court stated that:

> [B]y the word collusion, we do not mean to imply fraudulent or improper conduct, but simply that all interested parties agreed to the order and that it was apparently to their advantage from a tax standpoint to do so. We mean that there was no genuine issue of law or fact as to the right of the beneficiary to receive this income, and no bona fide controversy between the trustee and beneficiary as to property rights . . . .[20]

With these conflicting views among the circuits, and sometimes within a single circuit, the stage was set for the Supreme Court to resolve the issue after thirty years of silence.

II. THE BOSCH CASE

In *Commissioner v. Bosch*,[21] the decedent, a resident of New York, created in favor of his wife a revocable trust over which she had a general power of appointment. In 1951 the wife executed an instrument purporting to release the general power of appointment in favor of a special power. If this release were valid, the trust would not qualify for the marital deduction under section 2056 of the 1954 Internal Revenue Code. At the death of Mr. Bosch in 1957, his estate took a marital deduction for the value of the trust. The Commissioner of Internal Rev-

18. *See also* Merchants Nat'l Bank & Trust Co. v. United States, 246 F.2d 410, 417-18 (7th Cir. 1957).

19. 323 F.2d 438 (8th Cir. 1963).

20. *Id.* at 444. *See also* Saulsbury v. United States, 199 F.2d 578, 580 (5th Cir. 1952), *cert. denied*, 345 U.S. 906 (1953).

21. 387 U.S. 456 (1967).

enue denied the deduction claiming that the previous release allegedly creating a special power of appointment was valid. Pending litigation in the Tax Court, the estate filed a petition in the Supreme Court of New York. The state court held that the release was a nullity. The Tax Court regarded the judgment of the state court as an "authoritative exposition of New York law and adjudication of the property right involved."[22] On for the value of the trust. The Commissioner of Internal Rev- appeal the court of appeals affirmed stating that the test was "not whether the federal court is 'bound by' the decision of the state tribunal, but whether or not a state tribunal has authoritatively determined the rights under state law of a party to the federal action."[23]

In the companion case, *Second National Bank v. United States*,[24] the decedent's will and codicil had provided that one-third of the residuary estate should be held in trust for the decedent's widow, who was given a general testamentary power of appointment over the corpus. This portion of the trust, therefore, qualified for the marital deduction under section 2056 (b) (6). Under Connecticut law a bequest, which is exempt from estate taxes does not bear the burden of the taxes for the non-exempt portion of the estate unless the testator otherwise directs. The testator had indicated in his will that "the provisions of any statute requiring the appointment or proration of [estate] taxes . . . shall be without effect in the settlement of my estate." The widow claimed the trust as part of the marital deduction and it was computed as one-third of the residue of the estate before the payment of federal estate taxes. The Commissioner disallowed the claimed deduction and required that the estate tax be charged to the full estate including the wife's share of the trust. The petitioner filed an application in the state probate court to determine, under state law, the proration of the federal taxes paid. In a non-adversary proceeding the court found that the entire tax was to be charged against the two-thirds portion not attributable to the wife. The Commissioner rejected this decision. The petitioner paid a deficiency and brought suit in the United

22. Estate of Bosch, 43 T.C. 120, 124 (1964).

23. Commissioner v. Bosch, 363 F.2d 1009, 1014 (2d Cir. 1965). In this situation the circuit court was accepting the rationale in Gallagher v. Smith, 223 F.2d 218 (3d Cir. 1955).

24. 387 U.S. 456 (1967).

States District Court for a refund.[25] The district court upheld the judgment of the state court, and the Commissioner appealed. The federal circuit court of appeals reversed, holding that the Commissioner was not bound by the determination of the Connecticut court and that the taxes were to be charged to the entire residual estate because the testator showed the clear intent to avoid any proration.[26]

III. THE HOLDING

The Supreme Court of the United States, on appeal, affirmed the Second Circuit decision in *Second National Bank* and reversed and remanded the same circuit in *Bosch.* The Court held that when the federal estate tax liability turns on the character of a property interest held and transferred by the decedent under state law, federal authorities are not bound by the determination made of such property interest by a state *trial court.*[27] In effect the Court "views itself" as accepting the position that the federal authority will consider itself bound only by state law as determined by the *highest* court of the state.[28]

The Court in arriving at its conclusion utilized guarded and narrow language and appeared to restrict its holding to situations in which the marital deduction in federal estate taxation is involved.[29] The majority employed a report of the Senate Finance Committee which recommended the enactment of the marital deduction. From this the majority determined that " 'proper regard' not finality 'should be given to interpretation of the will' by state courts and then only when entered by a court 'in a bona fide adversary proceeding.' "[30]

The majority limited the discussion of the federal question to a strict interpretation of the marital deduction—that is, what

25. Second Nat'l Bank v. United States, 222 F. Supp. 446 (D. Conn. 1963).

26. United States v. Second Nat'l Bank, 351 F.2d 489 (2d Cir. 1965).

27. Commissioner v. Bosch, 387 U.S. 456, 457 (1967). In this case the Court limited its discussion to the effect of a state *trial* court proceeding. The Court was careful to point out that since *Blair* involved the effect of proceedings in a state appellate court, it was not in issue.

28. The Court rejected the *Gallagher* and *Pierpont* rationales, and accepted the position taken in *Faulkerson* which it considered as approaching the doctrine of Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

29. INT. REV. CODE of 1954 § 2056.

30. Commissioner v. Bosch, 387 U.S. 456, 464 (1967). *See also* S. REP. No. 1013, 80th Cong., 2d Sess. 4 (1948). This report is considered to be in keeping with the policy of Congress as expressed in Rules of Decision, 28 U.S.C. § 1652 (1948).

effect would a state decision have upon a particular federal statute. At the same time the Supreme Court applied the broad principles of the diversity cases[31] and arrived at the conclusion "that when the application of a federal tax statute is involved, the decision of a state *trial* court as to an underlying issue of a state law should *a fortiori* not be controlling."[32] Although the federal taxation statutes do not involve diversity situations, the majority concluded that the same principles could be applied.

> The State's *highest* court is the best authority of its own law . . . and . . . [i]f there be no decision by that court, then federal authority must apply what it finds to be the state law after giving 'proper regard' to the relevant rulings of other courts of the state.[33]

The majority asserted that the decision will avoid the conflict which has evolved from the "non-adversary—adversary" approach; while at the same time, the rule will be fair to the taxpayer and protect the federal revenue. This conclusion, however, is not in agreement with the intent of Congress. Congress has suggested that proper regard be given a state *trial* proceeding which is adversary. Congress apparently felt that a person who is *bound* by a certain property right under state law should not be taxed adversely by the federal government when the necessary implication of the taxing statute was to allow state law to be controlling as to an underlying issue. Since the federal courts may now make an independent investigation as to the state law, it is foreseeable that even if state trial court proceedings were adversary and the parties were bound by the decision, the federal authority would not be bound if it found the decision, "in its opinion," to be contrary to state law.

Mr. Justice Harlan and Mr. Justice Douglas wrote strongly worded dissents in the *Bosch* case. Mr. Justice Harlan accepted the view in *Pierpont* which the majority claims to have circumvented:

> [I]n cases in which state-adjudicated property rights are contended to have federal tax consequences, federal courts

31. *E.g.*, King v. Order of United Commercial Travelers of America, 333 U.S. 153 (1948); West v. A.T.&T., 311 U.S. 223 (1940); Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

32. Commissioner v. Bosch, 387 U.S. 456, 465 (1967).

33. *Id.* at 465 (emphasis added). *See also* King v. Order of United Commercial Travelers of America, 333 U.S. 153 (1948).

> must attribute conclusiveness to the judgment of a state court, of *whatever level in the state procedural system*, unless the litigation from which the judgment resulted does not bear the indicia of a genuinely adversary proceeding.[34]

He asserted that the majority opinion would require federal intervention to an unnecessary degree, which would injure both the relationship between federal and state law and the uniformity of the administration of law within the state.

Mr. Justice Douglas, on the other hand, accepted the *Freuler-Blair* approach as outlined in *Gallagher*. He declared that if the parties are bound under state law, the federal authorities should also be bound.[35]

The "adversary" approach of Mr. Justice Harlan appears to be the most reasonable and would be the most equitable to the taxpayer. Less doubt may result by knowing or being able to anticipate the possible outcome of the federal proceeding. Mr. Justice Douglas' approach appears to place the burden of proving collusion on the federal government, while the majority approach will place the burden of proving applicable state law on the taxpayer. Whatever the result of *Bosch*, one thing is certain—when a federal tax question turns on the character of a property right created by state law, it will be necessary for the taxpayer to be prepared to argue his property rights under state law in the federal courts.

IV. THE AFTERMATH OF BOSCH

It did not take long for a broad application of *Bosch* to appear. In *Underwood v. United States*[36] the testator stated in his will that the executor was not to receive as commissions more than 5% of the gross estate. The executor accepted the appointment but upon completion of his duties requested 8%. The state court granted 8% and the Commissioner disallowed 3% of the expense as a deduction of the estate contending that under Tennessee law, if the testator states a specific amount in his will which the executor may receive and the executor accepts his appointment, the executor is entitled to no greater compensation.

34. Commissioner v. Bosch, 387 U.S. 456, 481 (1967) (dissenting opinion) (emphasis added).

35. *Id.* at 466-67.

36. 270 F. Supp. 389 (E.D. Tenn. 1967) (supplemental opinion).

After an independent examination of Tennessee law the district court upheld the Commissioner even though they felt it was

> harsh for the beneficiary of the estate—a minor—to be required to pay 8% commission as fixed by the court and to disallow 3% of that amount for federal estate tax purposes because of the direction of her father in his will . . . .[37]

In *Lakewood Plantation, Inc. v. United States*,[38] a South Carolina district court case, a new dimension was added to *Bosch*. The grantor and taxpayer corporation had a deed reformed ab initio in order to reserve timber and mineral rights to the grantor. The Commissioner took the position that the corporation was attempting to escape tax liability based on these rights. Although the district court found collusion in the tax sense in the state court, it asserted that the Supreme Court in *Bosch* has disregarded the *Pierpont* reasoning for a much stronger view. In setting the case over for the trial, the court found that the question at hand was one of fact; and although *Bosch* allowed federal courts to review state law, its reasoning would also apply to an erroneous decision based on incorrect facts, and the federal court could make an independent investigation into these facts.[39]

The state courts are also realizing the effects of *Bosch*. In *Connecticut Bank & Trust Co. v. Cohen*,[40] a Connecticut court, in refusing to entertain a suit to determine whether a power of appointment was general or special, stated that "[o]ne gains the impression from *Bosch* that in the tax field state trial court decisions do no more than titillate the federal funny bone."[41] The court concluded by saying that even if it did make determination, the decision would only serve to be an amicus curiae brief for the taxpayer.

V. Conclusion

While *Bosch* is written in narrow terms, it does not appear that the federal circuits will find themselves limited in apply-

37. *Id.* at 395.

38. 272 F. Supp. 290 (D.S.C. 1967).

39. *Id.* at 294.

40. 232 A.2d 337 (Conn. Super. Ct. 1967).

41. *Id.* at 339. Perhaps the court overlooked the source of the rule. State courts have consistently decided these cases with one eye on the taxing statute and the other closed to the evidence and applicable state law.

ing it only to the marital deduction situations. *Bosch* can be applied uniformly among all jurisdictions in any situation in which a federal tax controversy hinges on the determination of a state property right. As found in *Lakewood*, the federal courts, in federal tax controversies, may also use this doctrine to set aside an erroneous application of facts in a state trial court. The Court in *Bosch* stated that *Blair* has not been overruled. From a broad application of the *Bosch* case, however, the Supreme Court would eventually find it necessary to overrule *Blair*. During the interim period there is little doubt that the federal courts will find some way to distinguish *Blair*, or if possible to overlook it completely.

STANLEY W. APPLEBAUM

INTERNATIONAL LAW—THE PUEBLO INCIDENT —POSSIBLE LEGAL ASPECTS UNDER INTERNATIONAL LAW

At 1:45 P. M., January 23, 1968, sailors of the North Korean Navy boarded and seized the U.S.S. *Pueblo* in waters off the coast of North Korea. The United States demanded release of the ship, claiming that the *Pueblo* had been seized in international waters, and stated that at no time had it intruded into the territorial waters of North Korea.

The Secretary of State of the United States called this action a violation of international law and an act of war.[1] North Korea answered declaring that the *Pueblo* was seized within North Korean territorial waters while carrying out hostile activities.[2]

The President reacted by calling to active duty 14,300 members of the Air Reserve National Guard and the United States Ambassador to the United Nations asked the Security Council to take prompt action before the United States was forced to take matters into its own hands.[3] North Korea emphatically stated that it would consider any United Nations resolution null and void.[4] It would appear from all indications, therefore, that North Korea will never voluntarily submit the case to the International Court of Justice or to any arbitration board. Although North Korea is not a member of the United Nations and not bound by her regulations and resolutions, however, as a nation she is subject to the basic principles of international law. The purpose of this article is to attempt to analyze the significance of the seizure of the Pueblo under international law.

The "law of nations", as international law is sometimes called, is primarily founded on custom and tradition. It is, therefore, often difficult to formulate exactly what the law is in a given area.

As one writer stated:

> International law may be defined as that body of law which is composed for its greater part of the principles and rules of conduct which States feel themselves bound to observe,

1. TIME, Feb. 2, 1968, at 13.
2. N. Y. Times, Jan. 24, 1968, at 1, col. 8.
3. TIME, Feb. 2, 1968, at 16.
4. N.Y. Times, Jan. 28, 1968, § 4, at E, col. 5.

and therefore, do commonly observe in their relations with each other. . . .[5]

This law governing the use of the seas, therefore, has arisen out of a balancing of the interests of all people who use these waters.[6] The existence of what is termed the "territorial sea" is an example of how competing interests shaped the development of the law of the seas. Whether the *Pueblo* was sailing within the North Korean territorial waters can only be evaluated against the general history relating to the concept of "territorial sea."

Against the generally recognized need for freedom of navigation of the seas for all nations, there has been the equally important need for coastal states to be able to regulate the use of waters adjacent to their coast. By the eighteenth century the right of a coastal state to exercise its sovereignty over the territorial sea had become firmly established. In 1702 Bynkershock, a Dutch jurist, stated what was then a well-known principle: A "littoral state could dominate only such width of coastal waters as lay within range of cannon shot from shore batteries."[7] Some writers are of the opinion that this distance was approximately three miles, while others feel that the three mile territorial sea had an independent origin.[8] Despite the widespread observance of a three mile limit, it has never become firmly established as a rule of international law.[9]

Among the chief opponents of the three mile rule has been the Soviet Union and some South American countries, who adopted the view that the breadth of the territorial sea should be left to the discretion of the individual nation.[10]

Attempts were made to reach an agreement with respect to the maximum breadth of the territorial sea at the Hague Codification Conference in 1930, the first Geneva Conference on the Law of the Sea in 1958, and the second Geneva Conference on the Law of the Sea in 1960. All of the conferences concluded without producing any agreement.

5. J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 1 (5th ed. 1953).
6. *Id.* at 19.
7. *Id.* at 180.
8. *Id.* at 181.
9. *Id*; M. McDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 486-88 (1962).
10. M. McDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 486 (1962); *see* 29 MIL. L. REV. 55-56 (1965).

This disagreement among the nations influenced the United States in 1960 to present a compromise proposal, calling for a six-mile territorial sea with an additional six miles for fisheries. Despite the fact that at the time the 1960 Conference convened only twenty of the seventy-three nations present adhered to the three-mile limit,[11] the United States asserted that it was under no duty to recognize any country's claim to a territorial sea of over three miles.[12] In contrast Russia, after the 1958 Geneva Convention, stated that the "three-mile limit is not and never has been a generally recognized rule in the law of the sea. The Conference once and for all buried the three-mile limit legend."[13]

North Korea asserts that her sovereignty over her territorial sea extends to a distance of twelve miles from the coast and that the U.S.S. *Pueblo* was within this twelve mile boundary at the time it was seized. The previous discussion indicated that the law concerning the breadth of the territorial sea is extremely unsettled. It would be difficult at this time, therefore, to conclude that the North Korean claim to twelve miles is in violation of international law. Assuming, for the purpose of discussion, that the twelve mile claim is permissible under the law of nations, it is next necessary to determine whether any rule of law permitted the *Pueblo* to navigate within the territorial sea of North Korea.

> Over its territorial waters along the marginal sea the control of the territorial sovereign is limited. While it may regulate at will matters pertaining to fisheries, the enjoyment of the underlying land, coastal trade, police and pilotage, the use of particular channels, as well as maritime ceremonial, it is not permitted to debar foreign merchant vessels from the enjoyment of what is known as the right of 'innocent passage', so long as the conduct of a vessel is not injurious to the safety and welfare of the littoral state.[14]

This right of innocent passage, developed as a natural corollary to the doctrine of freedom of the seas,[15] in practice applies to both merchant vessels and warships.[16]

11. 29 MIL. L. REV. 55 (1965).
12. *Id.* at 57.
13. *Id., quoting* Turkin, *The Geneva Conference on the Law of the Sea,* INT'L AFFAIRS 47 (Moscow, 1958).
14. 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 343-44 (1965), *quoting*, V. Wallace, mem., Oct. 31, 1956, Ms. Dept. of State, file 237.1541—Caribel 10-3156.
15. *Id.* at 347.
16. M. McDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 214 (1962).

There has, however, always been disagreement with respect to whether warships enjoy the same freedom of navigation through the territorial seas as do merchant vessels.[17] The 1958 Convention on the Territorial Sea and Contiguous Zones adopted the view that the right of innocent passage is enjoyed by all ships.[18] In adopting this view the 1958 Convention rejected the proposed requirement that warships must have prior authorization or give notice of their intention to pass through the territorial sea of a coastal state.[19] Despite the results of the conference the predominant attitude of many states could be that warships are required to give notice before exercising the right to pass through territorial waters.[20] If the opinion of nations is that this prior notice must be given by a warship, the United States could possibly be condemned (assuming again that the *Pueblo* was within the territorial waters of North Korea). There is no evidence, however, that North Korea has set forth this as a requirement for warships that might enter her territorial waters.[21]

As the words "innocent passage" imply, the movement of a vessel through the territorial sea must be in a manner which is not prejudicial to the peace, good order, or security of the littoral state.[22] Article 14 of the Convention on the Territorial Sea and the Contiguous Zone contains the following provisions pertaining to the right of innocent passage:

> 2. Passage means navigation through the territorial sea for the purpose of either traversing the sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters.
>
> 3. Passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by *force majeure* or by distress.

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17. *Id.* at 217; 1 C. HYDE, INTERNATIONAL LAW 516 (2d rev. ed. 1945).

18. 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 344 (1965).

19. M. McDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 219-20 (1962).

20. *Id.* at 220. *But see* C. HYDE, INTERNATIONAL LAW 517-18 (2d rev. ed. 1945).

21. Upto this point it has been assumed, for the sake of argument that the U.S.S. *Pueblo* is a warship. With respect to the right of innocent passage the law of nations seems to make a distinction only between the rights of warships and merchant vessels and does not define any separate rights for state ships other than men-of-war.

22. J. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 184 (1963).

4. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Such passage shall take place in conformity with these articles and with other rules of international law.

The problem here, of course, is to determine whether the intelligence gathering activities of the *Pueblo* were dangerous enough to be labeled, "prejudicial to the peace, good order or security" of North Korea. In the *Corfu Channel Case*, four British warships were proceeding through the North Corfu Channel with crews at "action station," with guns trained fore and aft and not loaded, when two ships were struck by mines moored in Albanian territorial waters. This passage was held to be "innocent" by the International Court of Justice because the ships had a political mission with an intention to intimidate with a display of force.[23] At least one writer was of the opinion that if the purpose of the passage had been to observe the shoreline and battery emplacements then it would not have qualified as innocent.[24] Due to the widespread use of electronic eavesdropping equipment among nations today, however, a claim that the *Pueblo* was threatening the security of North Korea would probably have little merit. Presently Russian trawlers similar to the *Pueblo* are stationed off California, South Carolina, Florida's Cape Kennedy, Guam and Alaska.[25] The use of these so-called "spy ships" is simply another facet of the "cold war" which has heretofore been accepted by the nations of the world. If perhaps there had been an armada of United States ships following the *Pueblo* or a sudden concentration of troops on the North Korea border, there would have been more cause for fear. Without some action of this nature, however, it would be difficult for North Korea to prove that her security was being threatened.

Even assuming that North Korea could show a legitimate reason for concern, however, the actual seizing of the *Pueblo* seems to violate all rules of international law. The 1958 Convention on the Territorial Sea and the Contiguous Zone codified the apparent customary international law concerning the coastal state's jurisdiction over warships within its territorial waters. Article 23 of the Convention provides:

23. 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 355-56 (1965).
24. *Id.* at 357.
25. TIME, Feb. 2, 1968, at 15.

> If any warship does not comply with the regulations of the coastal state concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal state may require the warship to leave the territorial sea.[26]

It would seem therefore that warships are not subject legally to the jurisdiction that North Korea has exercised over the *Pueblo*. On the other hand, the law is not explicit with respect to the jurisdiction over government vessels other than warships. In a detailed analysis of the problem in *The Public Order of the Oceans*, however, a similar immunity is shown to be enjoyed by government vessels engaged in noncommercial operations.[27]

For the purpose of this discussion it has been assumed that the U.S.S. *Pueblo* was seized within the territorial waters of North Korea. If, as the United States claims, the *Pueblo* was seized in international waters the doctrine of "hot pursuit" becomes an important consideration. Under this doctrine a vessel which violates the law of a littoral state while in its territory may be pursued onto the high seas and arrested. The most recent and most comprehensive codification of "hot pursuit" is the product of the 1958 Geneva Convention on the High Seas. Article 23 provides:

> 1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations of that state. Such pursuit may be commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone of the pursuing state, and may be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted. . . .[28]

Although there is no specific provision in Article 23 exempting warships or other governmental vessels from this right of a coastal state, Articles 8 and 9 grant complete immunity from any jurisdiction by the coastal state to warships and government vessels used in non-commercial service while on the high seas.

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26. M. McDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 283 (1962).
27. *Id.* 284-89.
28. 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 678 (1965)

It would seem that these Articles would apply even when the right of hot pursuit was being exercised.[29]

The previous analysis has resulted in the following conclusions: First, North Korea's claim to a twelve mile territorial sea may be valid under existing international law. Second, the U.S.S. *Pueblo* was probably competent to exercise the right of innocent passage through the territorial waters of North Korea. Third, it would be extremely difficult for North Korea to set forth a convincing argument to the effect that such passage was not innocent. Fourth, even if this could be done the seizure of the *Pueblo* would more than likely be considered illegal. Finally, the doctrine of hot pursuit exists although it is doubtful if North Korea was competent to exercise jurisdiction over a ship such as the *Pueblo* while on the high seas.

It appears, therefore, that the seizure of the *Pueblo* would be considered illegal under international law if the question were ever submitted to the International Court of Justice or a board of arbitration.[30]

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29. *Id.* at 634, 636.

30. In 1804 the United States found itself in a similar predicament when the U.S.S. *Philadelphia* was seized and her crew clapped in irons by Barbary pirates after she had run aground in Tripoli harbor. Lieutenant Stephen Decatur with 84 men slipped into the harbor, routed the 200 men guarding the *Philadelphia,* set fire to her and sailed away in the famous *Intrepid.* TIME, Feb. 2, 1968, at 14.

STATUTORY FEDERAL INTERPLEADER—FEDERAL INTERPLEADER MAY BE INVOKED EVEN THOUGH DIVERSITY AMONG THE CLAIMANTS IS MINIMAL AND NONE OF THE CLAIMS HAVE BEEN REDUCED TO JUDGMENT*

At law the only course open to the disinterested stakeholder (the holder of a "thing, debt or duty" who has no interest in that which he holds) confronted by several adverse claims to the stake, was to defend against each claim as suit was brought by the several claimants. Equity recognized the unfair burden which maintaining defenses to several actions related to a subject in which he had no interest imposed upon the stakeholder. The bill of interpleader was equity's remedy. After the bill of complaint had been filed and the stake paid into the equity court, that court would interplead the several claimants so that they might litigate their claims among themselves without involving the stakeholder in the controversy. The stakeholder's remedy was protection or indemnification against subsequent actions brought with respect to the stake.[1]

Federal courts had jurisdiction to entertain bills of interpleader before Congress spoke on the subject,[2] but their jurisdiction was inadequate in many cases because of limitations on federal jurisdiction. District courts could issue process only within their respective districts,[3] and they could not ordinarily stay proceedings in state courts without specific congressional authority.[4] If a claimant were in another district or brought action in a state court, the federal courts were rendered ineffective forums for an interpleader action because the court was powerless to interplead some of the claimants.

State courts were also unable to provide effective relief in many instances. If one of the claimants happened to be a citizen

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* State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967).

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1. 4 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1320 (5th ed. 1941).

2. Klaber v. Maryland Cas. Co., 69 F.2d 934, 937 (8th Cir. 1934); citing Chafee, *Interpleader in the United States Courts*, 41 YALE L.J. 1134 (1932).

3. *E.g.*, Robertson v. Railroad Labor Bd., 268 U.S. 619 (1925).

4. 28 U.S.C. § 2283 (1965); Essanay Film Mfg. Co. v. Kane, 258 U.S. 358 (1922).

of another state, because of the state court's limited jurisdiction its interpleader remedy was only partially effective.[5]

There was, therefore, often no satisfactory forum for an interpleader action. This situation became of increasing interest to insurance companies with the advent of automobile liability insurance and increased interstate commerce. When it had issued a limited liability policy under which there arose a number of claimants whose claims were mutually exclusive, the insurance company was put in the position of being a disinterested stakeholder. The question was not whether it would have to pay to the full extent of its liability, but to whom it would pay. Because of the jurisdictional limitation of state and federal interpleader, "the company was often sued upon the same policy in two or more states or districts, and thus subjected to vexatious . . . litigation. . . ."[6]

Congress provided a partial remedy in the initial federal interpleader act, the Federal Interpleader Act of 1917.[7] That act extended the jurisdiction of district courts to permit their interpleading of claimants within and without their districts. A subsequent act, the Federal Interpleader Act of 1926,[8] *inter alia*, gave the district courts authority to stay suits in state courts when interpleader had been invoked. The two primary impediments to functional federal interpleader proceedings had thus been removed.

In *State Farm Fire & Casualty Co. v. Tashire*[9] the insurance company, State Farm, had insured the driver of a pickup truck who collided with a Greyhound bus injuring more than thirty persons. Among the claimants were citizens of five states. No claims had been reduced to judgment, but the insurance company had been named as a defendant in four suits filed in California state courts seeking damages in excess of $1,000,000. State Farm's bodily injury liability was limited to $20,000 per accident. It also had the duty of legal representation of the driver in actions covered by the policy. State Farm brought action in the nature of interpleader[10] in the United States District Court

5. Klaber v. Maryland Cas. Co., 69 F.2d 934, 937 (8th Cir. 1934).
6. *Id.*
7. Ch. 113, 39 Stat. 929 (1917).
8. Ch. 273, 44 Stat. 416 (1926).
9. 386 U.S. 523 (1967).
10. See discussion *infra* n. 44.

for the District of Oregon asking that all claimants be required to establish their claims against the pickup driver and his insurer in that single proceeding and that State Farm be discharged from all further obligations under the policy. The district court issued a temporary injunction along the lines requested by State Farm. The injunction was later broadened to enjoin suits against the other potentially liable defendants, Greyhound Lines, Inc. and the owner of the pickup truck (who was not the driver).

The Court of Appeals for the Ninth Circuit reversed,[11] on interlocutory appeal[12] holding that in states which did not permit "direct action" suits against the insurance company, the company could not invoke federal interpleader until the claims against the insured had been reduced to judgment.

The Supreme Court's disposition of *Tashire* resolved significant questions related to the proper function of statutory federal interpleader and of federal jurisdiction under the current interpleader act, title 28 United States Code section 1335.

I. FEDERAL JURISDICTION UNDER THE INTERPLEADER ACT

The current federal interpleader act provides in part:

> The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader . . . if (1) Two or more adverse claimants, *of diverse citizenship as defined in section 1332* of this title, *are claiming or may claim. . . .* [13]

A. *Diverse Citizenship as Defined in Section 1332.*

The predecessors to section 1335 required that there be claimants from different states as a basis for federal interpleader jurisdiction[14] but this was construed not to be a requirement for "complete diversity."[15] However, the most recent revision of the

11. Tashire v. State Farm Fire & Cas. Co., 363 F.2d 7 (9th Cir. 1966).
12. 28 U.S.C. § 1292(a)(1) (1965).
13. 28 U.S.C. § 1335 (1965) (emphasis added).
14. Federal Interpleader Act of 1936, ch. 13, 49 Stat. 1096;
Federal Interpleader Act of 1926, ch. 273, 44 Stat. 416;
Federal Interpleader Act of 1925, ch. 317, 43 Stat. 976;
Federal Interpleader Act of 1917, ch. 113, 39 Stat. 929.
15. *E.g.*, Railway Express Agency v. Jones, 106 F.2d 341 (7th Cir. 1939); Cramer v. Phoenix Mut. Life Ins. Co., 91 F.2d 141 (8th Cir. 1937). "Complete diversity" is "where any claimant whose interests are adverse to another also has diverse citizenship from him . . . . [T]here are no disputes among co-citizens and any phase of the controversy could independently have been stated as a regular diversity suit." Haynes v. Felder, 239 F.2d 868, 871-72 (5th Cir. 1957).

interpleader statute, title 28 United States Code section 1335 adopts diversity as defined in section 1332 of that title as the basis for interpleader jurisdiction. Section 1332 defines the diversity required in general as a basis for federal jurisdiction in a civil action.

Incorporating the section 1332 diversity definition into the interpleader statute posed a potential constitutional problem. Section 1332 is the direct descendant of that portion of the Judiciary Act of 1789 which provided for federal jurisdiction on the basis of diversity.[16] Chief Justice Marshall, speaking for the Court in *Strawbridge v. Curtiss*, [17] construed that original diversity requirement as a requirement for complete diversity. Because the statutory language construed in *Strawbridge* was similar to that of Article III of the Constitution, which sanctions federal jurisdiction based on diversity of citizenship, the question arose whether it should be induced from the *Strawbridge* decision that the Constitution also requires complete diversity.[18]

Although the Court was not subsequently inclined to give *Strawbridge* this expansive reading,[19] the suspicion that it had constitutional overtones lingered.[20] Engrafting section 1332 diversity on to federal interpleader provided a nexus between *Tashire* and *Strawbridge* with its possible implication.

On its own motion the Court in *Tashire* raised the question whether the Constitution required complete diversity. Because of the Congressional intent to remedy the problems posed by mutiple claimants to a single fund and the tacit Congressional acceptance of the judicial interpretation that previous interpleader acts did not require complete diversity, the Court concluded that Congress intended to require only minimal diversity as a basis for invoking federal interpleader. The question was whether such an intent violated Artcile III of the Constitution. The Court found that it did not and that in fact the requirements of Article III were satisfied by "minimal diversity."[21]

The Court in concluding that there was no constitutional requirement relied on its previous decisions and those of inferior

16. *See* Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939).

17. 7 U.S. (3 Cranch) 267 (1806).

18. *See* Treinies v. Sunshine Mining Co., 308 U.S. 66, 71 (1939).

19. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 n. 6 (1967).

20. *E.g.,* Treinies v. Sunshine Mining Co., 308 U.S. 66, 71 (1939).

21. "Article III poses no obstacle to the legislative extension of federal jurisdiction founded on diversity, so long as any two adverse parties are not co-citizens." State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 531 (1967).

courts indicating that Article III imposed no requirement for complete diversity.[22]

Since, as the Court indicated, less than complete diversity had been acceptable in other contexts pursuant to other legislation[23] and neither the parties nor the lower courts had raised the issues, why did the Court feel compelled to consider the question of "complete diversity"? The answer may lie in the nature of the relationship between *Tashire* and *Strawbridge* or more specifically in the relationship between the two congressional requirements for diversity. Section 1332 is for practical purposes the same as that portion of the Judiciary Act construed in *Strawbridge*. The *Strawbridge* case indicates that Congress intended a requirement of "complete diversity." By adopting section 1332 diversity as a definition for the diversity required, the interpleader statute Congress used the same language in a situation in which it was clear that it did not intend to require complete diversity. The essential difference between diversity as construed in *Strawbridge* and *Tashire* was Congressional intent. The language construed in both cases is similar to that of Article III of the Constitution. *Tashire*, therefore, presented a situation in which the Court could clearly demonstrate that *Strawbridge* was based on the construction of a Congressional act and not upon any Article III limitation. Though we can only speculate as to the Court's motives, the clarity of the result is inescapable: No implication of a constitutional requirement for complete diversity should be drawn from *Strawbridge*, and there is in fact no such requirement.

B. *Are Claiming or May Claim*

The Court of Appeals had held that interpleader was not available in the circumstances presented by the *Tashire* case.[24] That decision rested on the facts that none of the claimants had reduced their claims to judgment and that neither the applicable state laws nor the terms of the policy provided for direct action against the insurance company. The court concluded that there were no "claimants" within the requirements of section 1335 and, therefore, that there was no basis for federal jurisdiction.[25]

22. *Id.* at 531, n. 7.
23. *Id.*
24. Tashire v. State Farm Fire & Cas. Co., 363 F.2d 7 (9th Cir. 1966).
25. Justice Douglas concurred in this view and dissented from the majority opinion. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 538-41 (1967).

The 1917 interpleader statute provided for jurisdiction when adverse claimants "are claiming or may claim" the stake, but the 1926 statute required claimants who "are claiming."[26] In *Klaber v. Maryland Casualty Co.*[27] the Court of Appeals for the Eighth Circuit found that by the omission of the "may claim" language in the 1926 act, Congress intended to require reduction of claims to judgment by at least two claimants prior to the invocation of interpleader by the insurance company. The court quoted Professor Chafee:

> This change was made in order to secure the passage of the Act of 1926. Some of the members of the Senate subcommittee were not willing to permit the companies to obtain the jurisdiction of the District Court when there was only a possibility of claims by two or more persons.[28]

Commenting later on this facet of the *Klaber* decision Professor Chafee wrote:

> [I]t is respectfully submitted that Judge Sanborn imposed a needlessly drastic test, and that a bill in the nature of interpleader should lie even before any judgment. It is sufficient for the court to assure itself that the danger of mutiplicity of suits is genuinely present. The seriousness of the accident and the obvious good faith of the victims in seeking damages meet this requirement.
>
> . . .
>
> The occurrence of a disaster giving rise to numerous bona fide claims that in the aggregate far exceed the limited liability should be sufficient showing of multiplicity of suits to support the bill.[29]

The objection to the requirement that at least two claims be reduced to judgment before interpleader could be invoked was the fact that it precipitated a race to judgment in which the first claimant to acquire judgment might disproportionately deplete the fund before the other claimants acted.[30] This consideration

26. *Compare* the Federal Interpleader Act of 1917, ch. 113, 39 Stat. 929 (1917) *with* the Federal Interpleader Act of 1926, ch. 273, 44 Stat. 416 (1926).
27. 69 F.2d 934 (8th Cir. 1934).
28. *Id.* at 939. Chafee, *Interpleader in the United States Courts*, 41 YALE L.J. 1134, 1163 n. 98 (1932).
29. Chafee, *The Federal Interpleader Act of 1936: II*, 45 YALE L.J. 1161, 1166 (1936).
30. *Id.*

apparently prompted Professor Chafee to attack the *Klaber* decision though it flew in the fact of his own recognition of Congressional intent.[31] *Tashire* decided this question.

In the 1948 revision of the Judiciary Act the "may claim" language was restored to the interpleader statute.[32] In *Pan American Fire & Casualty Co. v. Revere*[33] a Louisiana district court construed the inclusion of the "may claim" language as dispensing with the requirement that two claims must have been reduced to judgment by adverse claimants to facilitate invocation of federal interpleader. Some doubt was raised as to the effect of that decision in *National Casualty Co. v. Insurance Co. of North America.*[34] In that case an Ohio district court indicated that unliquidated claims would be too remote to justify an interpleader action unless by state law the insurance company was considered a joint tortfeasor and could be sued directly by the injured party. The *National Casualty* court distinguished *Revere* by pointing out that the court in that case had relied in part on the Louisiana direct action statute.

There was therefore some question as to the import of the 1948 restoration of the "may claim" language.[35] This question was heightened by the fact that the Revisor's Note to the Revision made no mention of the restoration of the "may claim" language indicating that Congress may have intended no substantive change by the addition.[36]

The Supreme Court in *Tashire* adopted the opinion that the omission of any reference in the Revisor's Note to the Revision was inadvertent.[37] The Court indicated that the weight of judicial authority favored adoption of the *Revere* construction as opposed to the narrower construction favored in *National Casualty*[38] and concluded that the language of the statute and the policy consideration of avoiding the race to judgment required the more liberal interpretation. It held that two claims should have been reduced to judgment before the insurance company

31. *Id.*
32. 28 U.S.C. § 1335 (1965).
33. 188 F. Supp. 474 (E.D. La. 1960).
34. 230 F. Supp. 617 (N.D. Ohio 1964).
35. 3-A J. MOORE, FEDERAL PRACTICE, § 22.08[2] (2d ed. 1967).
36. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 540-41 (1967) (Douglas, J., dissenting).
37. *Id.* at 532 n. 11.
38. *Id.* at 1204-05 & n. 12.

could have invoked interpleader. The restoration of the "may claim" language was interpreted as having overruled "the needlessly drastic test"[39] established by *Klaber*.

II. The Proper Scope of Federal Statutory Interpleader

Having decided that *Tashire* presented a proper situation for the invocation of interpleader, the Court considered the proper scope of the second stage of interpleader which involved the actual litigation of the claims among the claimants.

The district court had issued an injunction providing that all suits against State Farm, the pickup driver, the pickup owner and Greyhound be prosecuted in the interpleader proceeding.[40] Pursuant to that injunction all of the suits which arose out of the collision would have been settled in one interpleader proceeding.

The bill of interpleader was originally intended to serve one purpose, to relieve the disinterested stakeholder of the vexation of multiple litigation with respect to the stake.[41] To prevent spurious use of the bill for other purposes equity prescribed several strict rules limiting the invocation of interpleader. One of these requirements was that the claimants be in fact claiming the same thing or that their claims be mutually exclusive.[42] Professor Chafee gives the following explanation of that requirement:

> If A offers a commission to any broker who effects a sale of certain land and two brokers claim the commission, only one can be entitled because there can be but one sale. The claims overlap and cannot both be right. The requisite for interpleader exists. Suppose, however, A makes a contract with a broker C_1 to pay him a commission if he finds a purchaser ready, able, and willing to pay $200 an acre for the land, and makes a similar contract with C_2. If both brokers produce purchasers as described and sue for their commissions, there is no mutual exclusiveness. A's obligation to one broker is in no way conditional on the previous non production of a purchaser by some other broker. A may very likely be liable to both. The two suits are based on two

39. Chafee, *supra* n. 29.

40. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 528 (1967).

41. 3-A J. Moore, Federal Practice § 22.02[1] (2d ed. 1967); 4 J. Pomeroy, A Treatise on Equity Jurisprudence § 1320 (5th ed. 1941).

42. 4 J. Pomeroy, A Treatise on Equity Jurisprudence § 1323 (5th ed. 1941).

> obligations, not one. He cannot compel the brokers to interplead, for there is no controversy between them. In other words, when the two claims may both be right, and the validity of one does not depend upon the invalidity of the other, there is no reason why law or equity should unite them in one proceeding.[43]

Clearly the claimants which State Farm sought to interplead in *Tashire* were independent claimants. Their claims against the insured were not mutually exclusive. The insured could quite possibly have been liable to all of the claimants. Therefore it appears that a strict bill of interpleader would have been precluded by the requirement that the claims be mutually exclusive.

What State Farm requested, however, was a bill in the nature of interpleader. The 1936 Interpleader Act [44] gave federal courts jurisdiction over bills in the nature of interpleader. Prior to that time federal statutory interpleader had been subject to the same limitations as the strict equity interpleader, including the requirement that claims be mutually exclusive.[45] Permitting bills in the nature of interpleader was salutory, facilitating a relaxation of the rules limiting the invocation of interpleader and enabling the courts to premise the action on equities other than vexation of the stakeholder incident to multiple litigation.[46]

The original safeguards against misuse of interpleader, which proscribed its expansion as well, had been relaxed by Congress. The manifest question was how far interpleader might be expanded to encompass new situations and accomplish new purposes.

A situation in which expansion seemed desirable was presented in the *Tashire* or "pie slicing" situation.[47] There were a number of claimants against the insured party whose claims in the aggregate far exceeded the total funds available under the policy. If the insured tortfeasor were of modest means, the proceeds from the policy would be the only fund available for satisfying the judgments recovered. In such a situation it would seem appropriate that a bill in the nature of interpleader be invoked

43. Chafee, *Modernizing Interpleader,* 30 YALE L.J. 814, 819 (1921).

44. Ch. 13, 49 Stat. 1096.

45. Klaber v. Maryland, 69 F.2d 934, 939 (8th Cir. 1934).

46. 3-A J. MOORE, FEDERAL PRACTICE § 22.02[2] (2d ed. 1967); Chafee, *Federal Interpleader Since the Act of 1936,* 49 YALE L.J. 377, 412-21 (1940).

47. 3-A J. MOORE, FEDERAL PRACTICE § 22.02[2] (2d ed. 1967); Chafee, *Federal Interpleader Since the Act of 1936,* 49 YALE L.J. 377, 412-21 (1940).

to protect the fund. Permitting an interpleader action would prevent the race to judgment and dispersal of funds on an inequitable first come, first served basis.[48] The court could require all of the claims against the fund to be brought in a single action, though the judgments against the insured on which the claims were based would be recovered in separate actions. The Supreme Court found that a bill in the nature of interpleader would properly lie in such a situation but for the limited purpose of protecting the funds for the benefit of the claimants.[49]

Insurance companies are interested in interpleading not only all claims against themselves, *i.e.*, the fund, but all claims against their insured as well because of recent decisions indicating that a company which contracts to pay up to the limits of the policy and defend any suits arising thereunder, contracts for two distinct coverages.[50] It contracts to pay judgments against the insured up to the policy limits, and it independently contracts to defend in all of the suits against the insured arising from the accident.[51] In a case such as *Tashire* in which there was likely to be a great deal of litigation, the expense of defending against all of the suits would be considerable. This expense would be greatly reduced if the insurance company could interplead all of the claimants against its insured and settle all of the suits in one proceeding. Interpleader provided a means of avoiding the expense of defending a large number of separate actions if the court would allow it to be used for that purpose.

There was some statutory support for State Farm's contention that all of the suits related to the policy fund should be enjoined to secure their prosecution in the interpleader proceeding. section 2361 of title 28 provides in part:

> In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order re-

48. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 533 (1967). A race to judgment might also pose a problem for the insurer. Keeton, *Preferential Settlement of Liability Insurance Claims,* 70 HARV. L. REV. 27, 37 n. 10 (1956).

49. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 533-34 (1967).

50. *E.g.,* American Cas. Co. v. Howard, 187 F.2d 322 (4th Cir. 1951); Travelers Indem. Co. v. Greyhound Lines, Inc., 260 F. Supp. 530 (W.D. La. 1966).

51. *E.g.,* American Cas. Co. v. Howard, 187 F.2d 322 (4th Cir. 1951); Travelers Indem. Co. v. Greyhound Lines, Inc., 260 F. Supp. 530 (W.D. La. 1966).

straining them from instituting or prosecuting in *any proceeding* in any State or United States court *affecting the property, instrument or obligation* involved in *the interpleader action*. . . .[52]

When the claims are mutually exclusive, this section would clearly be applicable, but *Tashire* did not present such a situation. The Court concluded that the proponents of interpleader did not have the *Tashire* situation in mind and that, therefore, it did not come within section 2361.[53] The effect of the decision was to limit section 2361 to situations in which the claims are mutually exclusive, the situation which Congress had contemplated when enacting section 2361.

Having concluded that section 2361 did not require the enjoining of suits against the insured as well as suits against the insurance company, the Court looked to the effect of granting such an injunction. There were thirty-five claimants who wished to press claims against the truck driver, the truck owner and Greyhound as well as against State Farm, the truck driver's insurer. If an injunction along the lines requested by State Farm, as expanded to include Greyhound and the truck owner, and granted by the district court, were appropriate, all of these suits would have to be brought in a single forum and proceeding. The claimants would be stripped of their right to proceed independently upon their claims in their choice of the available forums.[54] The motivating force behind this sweeping injunction would be State Farm's $20,000 liability which would dictate the forum and proceeding for actions by numerous plaintiffs against several defendants involving claims far in excess of $20,000. The Court could find no support for such an injunction in the statutory interpleader scheme.[55] Interpleader was not intended to resolve all of the problems incident to multiparty litigation incident to a mass tort. It was not intended as an all purpose "bill of peace."[56]

State Farm's legitimate ground for seeking interpleader was to protect the $20,000 fund for the benefit of those who secured

52. 28 U.S.C. § 2361 (1965) (emphasis added).
53. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 534 (1967).
54. *Id.* at 536.
55. *Id.*
56. *Id.* at 535 n. 17.

judgment against its insured.[57] This purpose could be accomplished by requiring that all suits by claimants against State Farm be prosecuted in a single proceeding.[58] It was not necessary, desirable or permissible to require that claims against the alleged tortfeasor also be prosecuted in that proceeding. The Court would not let an interpleader action, invoked for a valid equitable purpose, be expanded in the second stage to permit the insurance company to mitigate its contractual obligation to defend the insured at the expense of denying the claimant's substantial rights.

III. Conclusion

The Court in dealing with the first stage of interpleader, which determines whether interpleader may be invoked, continued the practice of considering federal interpleader legislation as remedial and construing it liberally to accomplish its intended purpose. The Court held that jurisdiction under the interpleader act could be based on minimal diversity and that it was not necessary that there be technical claims, *i.e.*, claims which had been reduced to judgment, against the fund. The effect is to make interpleader more readily available in a greater number of situations.

The *Tashire* decision indicates with respect to the second stage of interpleader, which involves the actual litigation of the claims, that permitting the bill in the nature of interpleader does not divest interpleader of many of the characteristics of its equitable forerunner. The bill in the nature of interpleader, however, facilitates invocation of interpleader for equitable purposes other than protecting the stakeholder against the vexation of multiple claims and pursuant to that end, relaxes the traditional rules limiting interpleader to that purpose. Two inferences might be drawn from *Tashire*: Interpleader is inextricably associated with the idea of controlling the equities evolving around a particular fund held by the party seeking relief, or more generally that the interpleader proceeding is limited by general equitable theoretical consideration. Either premise would justify the *Tashire* decision, as the result would have been inequitable

57. *Id.* at 535; *See also* Travelers Indem. Co. v. Greyhound Lines, Inc., 260 F. Supp. 530, 535 (W.D. La. 1966).

58. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 535 (1967); *see also* Travelers Indem. Co. v. Greyhound Lines, Inc., 26 F. Supp. 530, 534-36 (W.D. La. 1966).

without reversal and the scope of the procedure would have exceeded that necessary for equitable disposition of the fund.

The narrower inference that interpleader should be confined to the equitable disposition of particular things, debts or duties seems more cogent. Interpleader should not be available for purposes other than those linked to a disposition of a particular fund without a legislative provision to safeguard against its misuse.

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